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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION (DAYTON)

\* \* \*

In Re: The Antioch Company, et al.,  
Debtors. CASE NO. 3:10-CV-156

THE ANTIOCH LITIGATION TRUST,  
W. TIMOTHY MILLER, TRUSTEE, BANKRUPTCY CASE NO.  
Plaintiff, 08-35741

vs. ADV. PRO. CASE NO.  
09-3409

LEE MORGAN, et al.,  
Defendants. Volume I

\* \* \*

Deposition of W. TIMOTHY MILLER,  
Plaintiff herein, called by the Defendants Lee  
Morgan, Asha Morgan Moran, Chandra Attiken, Marty  
Moran, Lee Morgan GDOT Trust #1, Lee Morgan GDOT  
Trust #2, Lee Morgan GDOT Trust #3, Lee Morgan  
Pourover Trust #1, and Lee Morgan Pourover  
Trust #2 for cross-examination pursuant to the  
Rules of Civil Procedure, taken before me, Kathy  
S. Wysong, a Notary Public in and for the State of  
Ohio, at the offices of Taft, Stettinius &  
Hollister, LLP, 1800 US Bank Tower, 425 Walnut  
Street, Cincinnati, Ohio, on Monday, December 17,  
2012, at 10:01 a.m.

\* \* \*

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<p>1 EXAMINATIONS CONDUCTED PAGE</p> <p>2 BY MR. SCHEIER:..... 6</p> <p>3 BY MR. PRENTISS:..... 148</p> <p>4 BY MS. BRENNAN:..... 199</p> <p>5</p> <p>6 EXHIBITS MARKED</p> <p>7 (Thereupon, Exhibit 788, notice of 11</p> <p>8 deposition of W. Timothy Miller, was</p> <p>9 marked for purposes of</p> <p>10 identification.).....</p> <p>11 (Thereupon, Exhibit 789, The Antioch 79</p> <p>12 Company Litigation Trust's response</p> <p>13 to first set of interrogatories of</p> <p>14 defendants Lee Morgan, Asha Moran,</p> <p>15 Chandra Attiken, Marty Moran, and</p> <p>16 certain named trust defendants</p> <p>17 directed to plaintiff The Antioch</p> <p>18 Company Litigation Trust, was marked</p> <p>19 for purposes of identification.).....</p> <p>20 (Thereupon, Exhibit 790, The Antioch 168</p> <p>21 Company Litigation Trust's response</p> <p>22 to first set of interrogatories of</p> <p>23 James A. Northrop, was marked for</p> <p>24 purposes of identification.).....</p> <p>25</p>	<p>1 On behalf of the Defendants Nancy Blair, Wayne</p> <p>2 Alan Luce, and Frederick Walker:</p> <p>3 Coolidge Wall</p> <p>4 By: Daniel J. Gentry</p> <p>5 Terrence Fague (Telephonically)</p> <p>6 Attorneys at Law</p> <p>7 Suite 600</p> <p>8 33 West First Street</p> <p>9 Dayton, Ohio 45402</p> <p>10 On behalf of the Defendants Ben Carlson, Denis</p> <p>11 Sanan, Jeanine McLaughlin, and Malte</p> <p>12 vonMatthiessen:</p> <p>13 Thompson Hine, LLP</p> <p>14 By: Jennifer Maffett</p> <p>15 Thomas A. Knoth</p> <p>16 Attorneys at Law</p> <p>17 Austin Landing I</p> <p>18 10050 Innovation Drive</p> <p>19 Suite 400</p> <p>20 Dayton, Ohio 45342-4934</p> <p>21 On behalf of the Defendants Houlihan Lokey</p> <p>22 Howard &amp; Zukin, Inc.; Houlihan Lokey Howard &amp;</p> <p>23 Zukin Financial Advisors, Inc.; and Houlihan</p> <p>24 Lokey Howard &amp; Zukin Capital, Inc.:</p> <p>25 DLA Piper LLP</p> <p>By: Andrew Fraerman (Telephonically)</p> <p>Eric Roberts (Telephonically)</p> <p>Attorneys at Law</p> <p>203 North LaSalle Street</p> <p>Suite 1900</p> <p>Chicago, Illinois 60601</p>
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<p>1 APPEARANCES:</p> <p>2 On behalf of the Plaintiff:</p> <p>3 Taft Stettinius &amp; Hollister LLP</p> <p>4 By: Marcia Voorhis Andrew</p> <p>5 Emily McNicholas</p> <p>6 Attorneys at Law</p> <p>7 1800 US Bank Tower</p> <p>8 425 Walnut Street</p> <p>9 Cincinnati, Ohio 45202-3957</p> <p>10 On behalf of the Defendants Lee Morgan, Asha</p> <p>11 Morgan Moran, Chandra Attiken, Marty Moran, Lee</p> <p>12 Morgan GDOT Trust #1, Lee Morgan GDOT Trust</p> <p>13 #2, Lee Morgan GDOT Trust #3, Lee Morgan</p> <p>14 Pourover Trust #1, and Lee Morgan Pourover</p> <p>15 Trust #2:</p> <p>16 Keating Muething &amp; Klekamp</p> <p>17 By: Michael L. Scheier</p> <p>18 Brian Muething (Telephonically)</p> <p>19 Attorneys at Law</p> <p>20 One East Fourth Street</p> <p>21 Suite 1400</p> <p>22 Cincinnati, Ohio 45202-3752</p> <p>23 On behalf of the Defendant McDermott Will &amp;</p> <p>24 Emery LLP:</p> <p>25 Faruki Ireland &amp; Cox P.L.L.</p> <p>By: Jeffrey S. Sharkey</p> <p>Attorney at Law</p> <p>500 Courthouse Plaza, S.W.</p> <p>10 North Ludlow Street</p> <p>Dayton, Ohio 45402</p>	<p>1 On behalf of the Defendant Candlewood Partners,</p> <p>2 LLC:</p> <p>3 McCarthy, Lebit, Crystal &amp;</p> <p>4 Liffman Co., L.P.A.</p> <p>5 By: Kimberly A. Brennan</p> <p>6 Attorney at Law</p> <p>7 101 West Prospect Avenue</p> <p>8 Suite 1800</p> <p>9 Cleveland, Ohio 44115</p> <p>10 On behalf of the Defendants Barry Hoskins,</p> <p>11 G. Robert Morris, Kimberly Lipson Wilson, Karen</p> <p>12 Felix, and Steve Bevelhymmer:</p> <p>13 Law Office of Robert A. Klingler</p> <p>14 Co., L.P.A.</p> <p>15 By: Robert A. Klingler</p> <p>16 Attorney at Law</p> <p>17 525 Vine Street</p> <p>18 Suite 2320</p> <p>19 Cincinnati, Ohio 45202-3124</p> <p>20 On behalf of the Defendant James Northrop:</p> <p>21 R. Daniel Prentiss, P.C.</p> <p>22 By: R. Daniel Prentiss</p> <p>23 Attorney at Law</p> <p>24 One Turks Head Place</p> <p>25 Suite 380</p> <p>Providence, Rhode Island 02903</p> <p>ALSO PRESENT:</p> <p>Richard Stevens, Videographer</p> <p>* * *</p>

<p style="text-align: right;">Page 6</p> <p>1 THE VIDEOGRAPHER: We're on the 2 record. 3 W. TIMOTHY MILLER 4 of lawful age, Plaintiff herein, having been first 5 duly cautioned and sworn, as hereinafter 6 certified, was examined and said as follows: 7 CROSS-EXAMINATION 8 BY MR. SCHEIER: 9 Q. Please state your name for the 10 record. 11 A. W. Timothy Miller. 12 Q. And, Mr. Miller, I assume you're 13 here to testify on behalf of The Antioch 14 Company Litigation Trust; is that correct? 15 A. That is correct. 16 Q. May I call you Tim? 17 A. Whatever is appropriate in the 18 context. I'm fine with that if the Court is 19 fine with that. 20 Q. It's completely up to you. 21 A. I'll defer to my counsel on that 22 one. Whatever the Court and the jury would 23 prefer. 24 Q. Okay. Well, then I'll call you 25 Mr. Miller.</p>	<p style="text-align: right;">Page 8</p> <p>1 deposition. 2 Q. Did you review Lee Morgan's 3 deposition transcript? 4 A. Not for -- in preparation for the 5 deposition, no. I may have looked at it some 6 time ago but not recently. 7 Q. Did you review Asha Moran's 8 deposition transcript? 9 A. I recall reviewing that some time 10 ago as well, but not -- not in preparation for 11 the deposition today. 12 Q. Why didn't you review Lee Morgan 13 or Asha Moran's deposition transcript in 14 preparation for this deposition today? 15 A. I focused my review on the 16 deposition exhibits, there were seven hundred 17 and eighty-seven of those, I believe, and I 18 viewed those being the contemporaneous written 19 record of what went on at the time to be the 20 best evidence and really the best place to 21 focus my efforts in terms of preparing for the 22 deposition today. 23 Q. When you said you reviewed 24 portions of Miss Attiken's transcript, how did 25 you choose what portions to review and what</p>
<p style="text-align: right;">Page 7</p> <p>1 THE WITNESS: Is that fine? 2 MS. ANDREW: Whatever -- 3 THE WITNESS: Very good. Okay. 4 BY MR. SCHEIER: 5 Q. All right. Did you prepare for 6 this deposition, Mr. Miller? 7 A. Yes, I did. 8 Q. And did you read any deposition 9 transcripts in preparing for the deposition 10 today? 11 A. I did review some of the 12 deposition transcripts, yes. 13 Q. What deposition transcripts did 14 you review? 15 A. There are various of them. 16 Certain of the -- I reviewed bits and pieces of 17 the various outside directors. Lee Bloom. I 18 recall one or more of the Houlihan people. 19 Let's see. A couple of the Deloitte people. 20 Let's see. Guy Walker, Chandra -- parts of 21 Chandra Attiken, parts of Guy Walker. That's 22 what I'm recalling right now. 23 Q. Did you review Marty Moran's 24 deposition? 25 A. I did review parts of Mr. Moran's</p>	<p style="text-align: right;">Page 9</p> <p>1 portions not to review? 2 A. I think with Attiken I probably 3 went through the early part of it and to some 4 later parts looking for, you know, again -- 5 typically was looking for our examination of 6 her and what she said in response to some of 7 those things. 8 Q. The same with Mr. Moran's 9 deposition, you were principally looking for 10 the Trust's cross-examination of Mr. -- 11 A. Primarily that. 12 Q. Yeah, one thing, Mr. Miller, if 13 you would be so kind as to permit me to 14 complete my question and -- 15 A. Of course. I'm sorry. 16 Q. No, no, that's okay -- and I will 17 try to allow you to complete your answer before 18 I follow up. 19 A. Excellent. Thank you. 20 Q. Would it be the same for 21 Mr. Moran's deposition, you chose to focus only 22 on the Trust's cross-examination of Mr. Moran? 23 A. Typically I would read the early 24 portions of the deposition to get a sense of 25 the background, and then would, yeah, try to</p>

<p style="text-align: right;">Page 10</p> <p>1 probably more focus in on our examination.  2 MR. SCHEIER: Marcia, I'm going to  3 reserve my rights to see what Mr. Miller notes  4 today. I think it's not appropriate he didn't  5 review certain deposition transcripts, and so we  6 can take that up and see how things go. I just  7 wanted to raise that with you now.  8 MS. ANDREW: Noted.  9 BY MR. SCHEIER:  10 Q. Other than reviewing each of the  11 seven hundred and eighty-seven deposition  12 transcripts and excerpts from some depositions,  13 did you review any other materials to prepare  14 for the deposition today?  15 A. I reviewed the complaint. I  16 believe I reviewed the discovery responses --  17 written discovery responses. That's all that's  18 occurring to me now. There were some -- no, I  19 think that's it for now that I can recall.  20 Q. Did you review the Trust's  21 discovery responses to the interrogatories that  22 were served on the Trust by Lee Morgan, Asha  23 Moran, Chandra Attiken, and Marty Moran?  24 A. Yes, I believe I did.  25 Q. Did you review the Trust's</p>	<p style="text-align: right;">Page 12</p> <p>1 placed before you, Mr. Miller, it's Exhibit  2 788.  3 A. Okay.  4 Q. Have you seen this exhibit before?  5 A. I have. Yes.  6 Q. This is the notice of deposition  7 that brings us here today; is that right?  8 A. That is correct.  9 Q. And did you have a chance to look  10 through, beginning on page two, the topics that  11 were designated for today's examination of the  12 Trust?  13 A. I did.  14 Q. Is there any topic there that you  15 did not prepare for?  16 A. It was my understanding that there  17 were certain topics that were in dispute, and I  18 have not reviewed or prepared with respect to  19 those.  20 Q. Any -- do you recall which topics  21 are in dispute that you didn't prepare for?  22 A. Let's see. I believe that they  23 were -- let's see. Items nine, maybe,  24 through -- I'll have my counsel correct me here  25 if I'm wrong, but items nine through sixteen, I</p>
<p style="text-align: right;">Page 11</p> <p>1 responses to the interrogatories, that sort of  2 information, about the damages the Trust is  3 claiming --  4 A. Yes.  5 Q. -- in this case?  6 A. Yes, I did.  7 Q. Did you review any other materials  8 relating to the calculation of damages that the  9 Trust is seeking in this case?  10 A. No. Outside the deposition  11 exhibits, no.  12 Q. Okay. Did you meet with any  13 witnesses in this case to prepare for this  14 deposition who have firsthand knowledge of the  15 facts?  16 A. No, I did not.  17 Q. Other than meeting with your  18 counsel, did you meet with any professional  19 advisor in preparation for today's deposition?  20 A. No, I did not.  21 (Thereupon, Exhibit 788, notice of  22 deposition of W. Timothy Miller, was marked for  23 purposes of identification.)  24 BY MR. SCHEIER:  25 Q. If you would look at the exhibit I</p>	<p style="text-align: right;">Page 13</p> <p>1 believe.  2 Q. Mr. Miller, I'm handing you what's  3 been marked in a prior deposition as Exhibit  4 22. I understand it to be a copy of the trust  5 agreement that established The Antioch Company  6 Litigation Trust. Is Exhibit 22 in fact the  7 trust agreement that established The Antioch  8 Company Litigation Trust?  9 A. I'm looking through it, but it  10 certainly does appear to be.  11 Q. Yeah, I ask because on the page  12 that immediately follows page twenty of the  13 document, it has the document control number  14 TRUST 00021, there's a space for your signature  15 and that's blank. I just want to confirm that  16 you signed  17 a -- signed this agreement at some point.  18 A. It is on the very next page.  19 Q. Oh, you're right. I missed that.  20 Thank you. I got it.  21 A. Yes.  22 Q. Thank you. And that is your  23 signature, in fact?  24 A. Yes, it is.  25 Q. Thank you. Mr. Miller, if you'd</p>

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1 turn to the first page of the trust agreement  
2 just after the cover page.

3 A. Uh-huh.

4 Q. You'll see in the opening  
5 paragraph, among a lot of other verbiage, it  
6 identifies the two classes of trust  
7 beneficiaries that are known as allowed Class 5  
8 impaired unsecured claims and allowed Class 7  
9 ESOT allocated stock interests. Do you see  
10 that?

11 A. Yes, I do.

12 Q. With regard to the Class 5  
13 impaired unsecured claims, can you describe for  
14 the jury generally who populates that class of  
15 trust beneficiaries?

16 A. Those would be the unsecured  
17 creditors of The Antioch Company, the debtor,  
18 who were not paid during the course of the  
19 bankruptcy pursuant to an order of the  
20 bankruptcy court that authorized the payment of  
21 certain but not all unsecured creditors in that  
22 case.

23 Q. And what sort of unsecured claims  
24 do the majority of the Class 5 impaired  
25 unsecured claims hold, if you know?

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1 A. When you say majority, by  
2 amount -- number is what you're talking?

3 Q. By --

4 A. Yeah.

5 Q. Well, by raw number at this point.

6 A. Yeah. By raw number, it would  
7 be -- the Class 5 claims would be subordinated  
8 note holders and ESOP note holders from the  
9 company that were -- I guess that's the terms  
10 that are used for those -- that class is.

11 Q. And do you know how the  
12 subordinated note holders came to become  
13 creditors of The Antioch Company?

14 A. Those were notes that were in  
15 coordination with the 2003 ESOP transaction,  
16 and then there were a few notes I believe that  
17 were issued subsequently with respect to  
18 certain warrants for the Morgan family; but  
19 that's primarily -- they all arose from the  
20 2003 ESOP transaction.

21 Q. And with regard to the ESOP notes,  
22 do you have a general understanding of how  
23 those folks that hold ESOP notes came to be  
24 creditors of The Antioch Company?

25 A. Yes, those notes were issued, I

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1 guess, annually following the ESOP -- the 2003  
2 ESOP transaction. So I believe the first  
3 series was in 2004 and then our subsequent  
4 series in '05, '06, and probably '07. And  
5 those were with respect to the company's  
6 obligation to pay for shares of -- or the  
7 interest of those creditors in the ESOP.

8 Q. Do you understand -- is it your  
9 understanding that the people that hold ESOP  
10 notes are former Antioch employees that either  
11 voluntarily or involuntarily terminated  
12 employment and that the notes were issued, in  
13 part, to provide them with the value of their  
14 retirement accounts in the ESOP?

15 A. That is my understanding, yes.

16 Q. Can you describe generally the  
17 nature of the claims or the trust beneficiaries  
18 that held at one time in the bankruptcy class  
19 seven claims?

20 A. The class seven claims, my  
21 understanding is that those are the folks who  
22 were ESOP participants as of the time of the  
23 bankruptcy filing. Those were existing  
24 employees who had interest in the ESOP at the  
25 time of the filing in November of 2009.

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1 Q. Might some of those people be  
2 current Antioch employees, to the best of your  
3 knowledge?

4 A. They may well be.

5 Q. With regard to that class of  
6 claimants, have you been in contact with Evolve  
7 Bank & Trust who purports to be the current  
8 ESOP trustee?

9 A. No, I have not.

10 Q. Okay. Are you aware that Evolve  
11 Bank & Trust purports to be the ESOP trustee  
12 representing the interests of former  
13 participants in the ESOP who remain  
14 participants as of the bankruptcy petition date  
15 in this case?

16 A. I don't have -- I don't have any  
17 knowledge of that, I guess, one way or the  
18 other.

19 Q. If you wouldn't mind, Mr. Miller,  
20 with regard to the Class 5 claims, can you --  
21 focusing on Exhibit 22, flip to the page in  
22 that exhibit that begins with the document  
23 control number TRUST 41. It's toward the back.

24 A. I didn't bring my reading glasses.

25 Q. I know, this one is tough. This

5 (Pages 14 to 17)

<p style="text-align: right;">Page 18</p> <p>1 one is tough. I don't need reading glasses and 2 it's hard to read.</p> <p>3 Generally are you aware of what 4 the spreadsheet that begins on Exhibit 22, 5 document number 41, represents?</p> <p>6 A. I will be honest with you, I'm 7 having a difficult time reading it. Let me see 8 what it might be. The ESOP note holders.</p> <p>9 Q. Let me maybe try to help. It 10 appears to be a listing of the beneficiaries of 11 the trust who are known as -- were known in the 12 bankruptcy as Class 5 claimants --</p> <p>13 A. Okay.</p> <p>14 Q. -- and the value of their claims; 15 and I just wanted to confirm that, to the best 16 of your knowledge, that's what it is, the 17 spreadsheet that is?</p> <p>18 A. It certainly appears to be. And 19 the other thing I will say about that, just so 20 we're clear, that these folks had to elect to 21 participate in the trust. So it's not 22 everybody who was as of the petition date 23 within that classification. It's everybody who 24 was within that classification as of the 25 petition date who then subsequently elected to</p>	<p style="text-align: right;">Page 20</p> <p>1 bankruptcy estate were going to be discharged 2 regardless. What they agreed to give up were 3 claims against the banks. So, yeah, I mean, it 4 was -- there was no question that the claims 5 were going to be discharged pursuant to the 6 plan and provided with some other sort of 7 treatment in lieu of cash money. It was a 8 question of what the treatment would be. So in 9 terms of affirmatively giving up anything, they 10 gave up claims against the lending 11 institutions.</p> <p>12 And, again, so we're clear, this 13 is not -- we talked about ESOP folks; but it's 14 not just ESOP, there were other, you know, 15 trade creditors. Like the first one on the 16 list is a landlord whose lease was not assumed. 17 And I believe that the U.S. Custom Service is 18 in here for a decent amount of money. So there 19 are other -- it is not just ESOP note holders 20 within the class, just so we're clear on that.</p> <p>21 Q. That's okay. I appreciate the 22 clarity.</p> <p>23 Would you say -- what would you 24 estimate the amount of nonsubordinated debt, 25 nonESOP note holder claims are against the</p>
<p style="text-align: right;">Page 19</p> <p>1 participate as beneficiaries in the trust.</p> <p>2 Q. And the information that is 3 contained on the spreadsheet we were just 4 looking at that begins at document control page 5 41 of Exhibit 22, was that derived from the 6 claims that these individuals had made against 7 the bankruptcy estate prior to electing to 8 become trust beneficiaries?</p> <p>9 A. I had thought that this 10 information had come from the company and the 11 company's records. Although, they did -- I'm 12 sure certain of these people filed claims and 13 when they were to elect to participate, they 14 were to put the claim amounts in the election 15 form, although, not all of them did that. But 16 I believe that these numbers came from the 17 company.</p> <p>18 Q. Is it fair to say that the 19 individuals who are listed in the spreadsheet 20 and are beneficiaries of the trust voluntarily 21 gave up their claims against the bankruptcy 22 estate to become beneficiaries of the trust 23 which are the trustee?</p> <p>24 A. They certainly elected to 25 participate -- their claims against the</p>	<p style="text-align: right;">Page 21</p> <p>1 Trust?</p> <p>2 A. Just looking at this, I would say 3 it's around a couple million dollars or more.</p> <p>4 Q. And looking at the total number of 5 claims held by the beneficiaries of the trust 6 who helped classify the claims against the 7 estate, what is that total?</p> <p>8 A. I don't know that I can see it on 9 here if it's in here.</p> <p>10 Q. Well, it is.</p> <p>11 A. I apologize.</p> <p>12 Q. It's on the last page of the 13 spreadsheet, sir. It looks to be about 14 seventy -- just under seventy-five million 15 dollars?</p> <p>16 A. Yes, that's -- well, is that 17 everybody? I think that -- okay. That's 18 everybody. So, yeah, okay, you're looking at 19 seventy-three million, roughly, versus two 20 million. Yeah, that's correct.</p> <p>21 Q. Do you know what the value of the 22 claims that trust beneficiaries have or 23 interest that trust beneficiaries have in the 24 trust who formerly held class seven claims 25 against the estate?</p>



<p style="text-align: right;">Page 22</p> <p>1 A. I don't believe that we were 2 provided with dollar amounts for those claims. 3 Q. Are those trust beneficiaries 4 entitled to a distribution from the trust on 5 account of their interests in the trust if the 6 trust, in fact, by way of settlement or 7 judgment, comes into money from this case? 8 A. They are after all of the Class 5 9 claims are paid in full. 10 Q. And if Class 5 claims are paid in 11 full and you need to make cash distribution to 12 claimants that at one time were ESOP 13 participants as of the petition date, how would 14 you go about calculating payments to those 15 claimants without the -- without information as 16 to the value of the interest they held in the 17 ESOP at the time of the bankruptcy? 18 A. We have percentages. We have -- 19 that was the information that was provided to 20 us by the debtors are percentages; and if 21 further investigation of that is necessary at 22 the time, that's certainly something we would 23 undertake to do. 24 Q. If both the trust beneficiaries 25 who held Class 5 claims and the trust</p>	<p style="text-align: right;">Page 24</p> <p>1 1.4. 2 A. Okay. 3 Q. The first sentence of Section 1.4 4 reads, on or after the effective date, at the 5 request of the trustee, the reorganized debtors 6 will provide to the Litigation Trust a loan of 7 up to two hundred and fifty thousand dollars. 8 Did you, in fact, request from the organized 9 debtor, that I understand is still called The 10 Antioch Company, a two hundred and fifty 11 thousand dollar loan for the trust? 12 A. It's my understanding that we're 13 into the area where -- that we're -- there's a 14 dispute as to whether or not we would be 15 providing or testifying as to that information. 16 Q. Well, that might be but I still 17 need you to answer the question. 18 A. Okay. I think from the Trust 19 standpoint, the internal dollars and 20 back-and-forth of the Trust is not public 21 information and that's not something that we 22 would be disclosing publicly. 23 Q. Well, that's okay. I'll keep this 24 portion of the record confidential. So the 25 question is, did you, in fact, request from the</p>
<p style="text-align: right;">Page 23</p> <p>1 beneficiaries who held class seven claims are 2 paid in full and money that the Trust has in 3 trust for the beneficiaries remains, how is 4 that to be distributed, to the best of your 5 understanding? 6 A. Well, if all there is are 7 percentages for the class seven folks, then 8 those dollars would go among those percentages, 9 period. If there are claim amounts, specific 10 amounts, then, you know, there would be 11 additional dollars left over. 12 I don't believe that the trust 13 agreement or necessarily the plan addresses 14 that eventuality, at least not to my 15 recollection, and to the extent it doesn't, we 16 would -- and that eventuality were to occur, we 17 would presumably go back to the bankruptcy 18 court for further instruction with respect to 19 that. 20 Q. Could you turn to page three of 21 Exhibit 22? It has the document control number 22 4 on the bottom right. 23 A. Okay. 24 Q. I want you to focus your 25 attention, if you would, Mr. Miller, on Section</p>	<p style="text-align: right;">Page 25</p> <p>1 company the two hundred and fifty thousand 2 dollar loan that you're entitled to request 3 pursuant to Section 1.4 of the trust agreement? 4 MS. ANDREW: I think you can answer 5 that. 6 THE WITNESS: Okay. Yes, I did. 7 BY MR. SCHEIER: 8 Q. And is it also true that the Trust 9 also received a two hundred and fifty thousand 10 dollar payment from the company to assist it in 11 prosecuting litigation in addition to the two 12 hundred and fifty thousand dollar loan 13 requested? 14 A. Yes, it did. 15 Q. If you'll notice, the other 16 language in Section 1.4 obligates the Trust to 17 repay the company before any trust 18 beneficiaries are repaid from any proceeds that 19 the Trust takes in. Do you generally recall 20 that provision? 21 A. Yes, I do. 22 Q. Okay. Do you recall that the 23 Trust settled with a few of the defendants in 24 this case, namely CRG, Michael Epstein, and 25 Paul Ravaris?</p>

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<p>1 A. Yes, they did.</p> <p>2 Q. Did the Trust use any of the</p> <p>3 proceeds of that settlement to repay a part of</p> <p>4 or all of the loan it took from The Antioch</p> <p>5 Company?</p> <p>6 A. Yes, it did.</p> <p>7 Q. And does the Trust still owe the</p> <p>8 Antioch -- owe The Antioch Company any money?</p> <p>9 A. No, it does not.</p> <p>10 Q. If you'd now turn your attention,</p> <p>11 Mr. Miller, to Section 1.5 of the agreement on</p> <p>12 the same page that we're looking at now.</p> <p>13 A. Uh-huh.</p> <p>14 Q. It's titled valuation of trust</p> <p>15 assets, and it appears to obligate the trustee</p> <p>16 to make a good faith valuation of trust assets.</p> <p>17 Do you see that?</p> <p>18 A. Yes.</p> <p>19 Q. Did the trustee, in fact, do so as</p> <p>20 we sit here today?</p> <p>21 A. No.</p> <p>22 Q. Why not?</p> <p>23 A. I think at the time that we got --</p> <p>24 there was no -- very -- basically what the</p> <p>25 Trust got was two hundred and fifty thousand</p>	<p>1 the trust advisory board since that entity has</p> <p>2 been established?</p> <p>3 A. Yes. They were members of the</p> <p>4 official committee of unsecured creditors that</p> <p>5 was appointed by the office of the United</p> <p>6 States Trustee during the bankruptcy case.</p> <p>7 Q. Are any of those four</p> <p>8 beneficiaries of the trust?</p> <p>9 A. Yes, all of them are.</p> <p>10 Q. How did John Moore's interest in</p> <p>11 the trust arise, to the extent that you know?</p> <p>12 A. He is an attorney in Dayton. His</p> <p>13 client is the first entity, the landlord entity</p> <p>14 listed on the attachment, the 2327 Commerce</p> <p>15 Center Boulevard, LLC.</p> <p>16 Q. And Kay Richter, do you have</p> <p>17 knowledge of how her interest in the trust</p> <p>18 arose?</p> <p>19 A. She is an ESOP note holder.</p> <p>20 Q. Heidi Everett, do you know how her</p> <p>21 interest in the trustee arose?</p> <p>22 A. She was also an ESOP note holder.</p> <p>23 Q. And Lisa Drew, do you know how her</p> <p>24 interest in the trust arose?</p> <p>25 A. She was also an ESOP note holder.</p>
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<p>1 dollars plus litigation claims, and at that</p> <p>2 juncture we had no -- beyond the two hundred</p> <p>3 and fifty thousand dollars, no way at that</p> <p>4 juncture of accurately valuing those litigation</p> <p>5 claims.</p> <p>6 Q. And is that true to today, that</p> <p>7 the Trust has no -- in the Trust's view, it is</p> <p>8 unable to value the Trust claims?</p> <p>9 A. Aside from the -- you know, what</p> <p>10 we've said thus far in terms of the</p> <p>11 interrogatory answers on damages, you know,</p> <p>12 that's about as much as we could do in terms of</p> <p>13 valuing those claims.</p> <p>14 Q. If you would, please, Mr. Miller,</p> <p>15 turn to the very next page of Exhibit 22. It's</p> <p>16 internal page four and document control page 5.</p> <p>17 A. Okay.</p> <p>18 Q. And you'll see Section 1.7 refers</p> <p>19 to a trust advisory board.</p> <p>20 A. Uh-huh.</p> <p>21 Q. I just wanted to know who the</p> <p>22 members of that board are currently.</p> <p>23 A. John Moore, Heidi Everett, Lisa</p> <p>24 Drew, and Kay Richter.</p> <p>25 Q. And have they been the members of</p>	<p>1 Q. Is the trust advisory board able</p> <p>2 to -- strike that.</p> <p>3 Do you as trustee take direction</p> <p>4 from the trust advisory board in terms of your</p> <p>5 prosecution of this litigation?</p> <p>6 MS. ANDREW: You can answer that in</p> <p>7 general. I don't want you to reveal any</p> <p>8 attorney-client communications specifically.</p> <p>9 THE WITNESS: Yes.</p> <p>10 BY MR. SCHEIER:</p> <p>11 Q. And have they, in fact, done so in</p> <p>12 this case?</p> <p>13 MS. ANDREW: You may answer.</p> <p>14 THE WITNESS: Yes.</p> <p>15 BY MR. SCHEIER:</p> <p>16 Q. If you could turn now to --</p> <p>17 sticking with Exhibit 22, Mr. Miller -- page</p> <p>18 eleven, and that's the internal number and it's</p> <p>19 document control number 12. I'd like you to</p> <p>20 focus your attention, to be so kind, on Section</p> <p>21 2.7.</p> <p>22 A. Okay.</p> <p>23 Q. Section 2.7 is titled trustee's</p> <p>24 compensation, indemnification, reimbursement.</p> <p>25 Do you see that?</p>



<p style="text-align: right;">Page 30</p> <p>1 A. Uh-huh.</p> <p>2 Q. Is that a yes?</p> <p>3 A. I'm sorry. Yeah.</p> <p>4 Q. Yeah, that's okay.</p> <p>5 A. Yes.</p> <p>6 Q. Okay. It also refers to in</p> <p>7 Exhibit C that purported to be the engagement</p> <p>8 letter between you and the Trust, and the copy</p> <p>9 of this document I have didn't have Exhibit C</p> <p>10 attached.</p> <p>11 A. Okay.</p> <p>12 Q. Would you please then describe for</p> <p>13 the jury how you as trustee are compensated for</p> <p>14 the services you provide in this case to the</p> <p>15 trust?</p> <p>16 MS. ANDREW: We're going to object.</p> <p>17 That's one of the areas that we objected to in</p> <p>18 advance of the deposition. We don't see how the</p> <p>19 trustee's compensation is relevant to any of the</p> <p>20 claims or defenses in this case.</p> <p>21 MR. SCHEIER: Oh, it goes to bias --</p> <p>22 the trustee's bias in prosecuting the case and the</p> <p>23 trustee's financial interest in the case; and the</p> <p>24 jury or the judge who might be trying the facts is</p> <p>25 entitled to know that the plaintiff has a</p>	<p style="text-align: right;">Page 32</p> <p>1 hundreds of millions dollars of damages from the</p> <p>2 defendants in this case and the jury should know</p> <p>3 whether or not his compensation is based on a</p> <p>4 percentage of the money that he may or may not</p> <p>5 take in as a result of the case.</p> <p>6 MS. ANDREW: Well, we disagree that</p> <p>7 his compensation has any relevance. I'm sure the</p> <p>8 jury would understand that he's not a volunteer</p> <p>9 and that he would be compensated just as all the</p> <p>10 attorneys in the case are compensated for their</p> <p>11 work in connection with the case. The --</p> <p>12 MR. SCHEIER: Well, here's the -- are</p> <p>13 you taking a privilege objecting, instructing him</p> <p>14 not to answer, because an instruction not to</p> <p>15 answer on relevancy grounds is not proper?</p> <p>16 MS. ANDREW: Well, we can --</p> <p>17 MR. SCHEIER: It's a deposition and</p> <p>18 you can take it up later with the Court and that</p> <p>19 can be excluded from the record that the jury will</p> <p>20 hear if you're, in fact, correct.</p> <p>21 MS. ANDREW: The Exhibit C was not</p> <p>22 included on this exhibit because it was not in</p> <p>23 existence at the time that this was filed with the</p> <p>24 Court. So perhaps at a break we can look into</p> <p>25 whether we can produce the ultimate engagement</p>
<p style="text-align: right;">Page 31</p> <p>1 financial interest in the case even though he</p> <p>2 purports to be an independent fiduciary.</p> <p>3 MS. ANDREW: Well, the trustee will</p> <p>4 not be testifying to any personal knowledge so the</p> <p>5 issue of bias is really a red herring. Bias goes</p> <p>6 to whether the bias of a witness is likely to make</p> <p>7 his testimony as to facts more or less credible in</p> <p>8 the case, but he's not going to be testifying to</p> <p>9 personal knowledge because he has none regarding</p> <p>10 the underlying facts at issue.</p> <p>11 MR. SCHEIER: I believe that -- well,</p> <p>12 two responses, and I don't want to argue it out</p> <p>13 here, but Exhibit C is not included and that sets</p> <p>14 forth the compensation arrangement and the</p> <p>15 engagement, and for whatever reason, it's not</p> <p>16 here.</p> <p>17 MS. ANDREW: Right, it --</p> <p>18 MR. SCHEIER: And so if you're going</p> <p>19 to produce it here in this deposition for us to</p> <p>20 look at, then it might avoid some of the</p> <p>21 questions. But without Exhibit C, I'm unable to</p> <p>22 know what the trustee's compensation arrangement</p> <p>23 is; and I believe it goes to the bias of the</p> <p>24 plaintiff in this case. Mr. Miller is prosecuting</p> <p>25 claims seeking, based on your interrogatory,</p>	<p style="text-align: right;">Page 33</p> <p>1 letter between the Trust and --</p> <p>2 MR. SCHEIER: I don't mean to cut you</p> <p>3 off. I have limited time.</p> <p>4 MS. ANDREW: Yeah.</p> <p>5 MR. SCHEIER: I don't believe it's</p> <p>6 appropriate to instruct not to answer based on</p> <p>7 relevancy. That's an objection that you preserve</p> <p>8 and you can object to the judge at the time of</p> <p>9 trial; and if the judge agrees that Mr. Miller's</p> <p>10 testimony about his compensation in this case is</p> <p>11 irrelevant to the claimed defenses or that bias is</p> <p>12 something that is not appropriate to bring in</p> <p>13 front of the jury, he'll so rule and the testimony</p> <p>14 will be excluded.</p> <p>15 MS. ANDREW: Well, we make our</p> <p>16 objection for the record. I would allow the</p> <p>17 witness to testify generally as to the terms of</p> <p>18 the trustee's compensation arrangement.</p> <p>19 THE WITNESS: Okay. The trustee</p> <p>20 compensation piece is the compensation piece</p> <p>21 applicable to a Chapter 7 bankruptcy trustee as</p> <p>22 set forth in the United States Code. I believe</p> <p>23 it's Section 325. It's a sliding scale percentage</p> <p>24 based upon funds distributed to creditors and --</p> <p>25 so, yeah, that's what -- that's what it provides.</p>

<p style="text-align: right;">Page 34</p> <p>1 There's no -- it's purely based upon what a -- you</p> <p>2 know, what a trustee in a liquidating case, in a</p> <p>3 Chapter 7 case would be paid.</p> <p>4 BY MR. SCHEIER:</p> <p>5 Q. Okay. This is, of course -- or</p> <p>6 the bankruptcy, of course, was not a</p> <p>7 liquidating bankruptcy, correct?</p> <p>8 A. Correct.</p> <p>9 Q. The Antioch Company reorganized</p> <p>10 and is currently operating; is that correct?</p> <p>11 A. That is correct.</p> <p>12 Q. With regard to your compensation,</p> <p>13 is it also correct that the more assets you</p> <p>14 take in through this particular piece of</p> <p>15 litigation distributed to creditors, the</p> <p>16 greater the compensation you'll receive as</p> <p>17 trustee?</p> <p>18 A. The trustee fee portion inasmuch</p> <p>19 as it is a percentage, yes, a sliding scale</p> <p>20 percentage up to I think three percent is</p> <p>21 the -- you know, as the -- the larger it gets,</p> <p>22 the larger the percentage -- the smaller the</p> <p>23 percentage becomes basically.</p> <p>24 Q. Now, you're also an attorney; is</p> <p>25 that correct, Mr. Miller?</p>	<p style="text-align: right;">Page 36</p> <p>1 you receive as a partner of the law firm?</p> <p>2 A. Again, as I -- I think I just</p> <p>3 answered that question or maybe I</p> <p>4 misunderstood, but I -- as I sit here today, I</p> <p>5 don't know that one way or the other.</p> <p>6 Q. Is it a possibility?</p> <p>7 A. Is it a possibility? I suppose</p> <p>8 it's a possibility, sure.</p> <p>9 Q. Okay. If you could turn your</p> <p>10 attention now to the same page, page eleven of</p> <p>11 the trust agreement, Section 2.7, Subsection</p> <p>12 (c).</p> <p>13 A. Uh-huh.</p> <p>14 Q. If you would look at that, it</p> <p>15 reads, the trustee is hereby authorized to</p> <p>16 obtain all reasonably and necessary insurance</p> <p>17 coverage, if any, for himself, and then it goes</p> <p>18 on a little bit. Do you see that?</p> <p>19 A. Yes. Uh-huh.</p> <p>20 Q. Did you, in fact, obtain insurance</p> <p>21 coverage for yourself in this case?</p> <p>22 A. Again, I think we get into kind of</p> <p>23 the internal workings of the trust. I don't</p> <p>24 understand how that is --</p> <p>25 Q. Well, I don't mean to -- I don't</p>
<p style="text-align: right;">Page 35</p> <p>1 A. I am.</p> <p>2 Q. And you are a law partner of Miss</p> <p>3 Andrew who's prosecuting this case on behalf of</p> <p>4 the Trust; is that right?</p> <p>5 A. Yes, I am.</p> <p>6 Q. And will your compensation as a</p> <p>7 partner -- strike that.</p> <p>8 You are a partner in the Taft law</p> <p>9 firm; is that right?</p> <p>10 A. I am.</p> <p>11 Q. And Miss Andrew is a partner in</p> <p>12 the Taft law firm?</p> <p>13 A. Yes, she is.</p> <p>14 Q. Will the compensation you received</p> <p>15 -- you receive as a part of the Taft law firm</p> <p>16 be in any way impacted by the amount of damages</p> <p>17 that you can bring into the trust by way of</p> <p>18 settlement or judgment?</p> <p>19 MS. ANDREW: If you know.</p> <p>20 THE WITNESS: I don't. As I -- no, I</p> <p>21 don't know as I sit here today.</p> <p>22 BY MR. SCHEIER:</p> <p>23 Q. Is there a possibility that the</p> <p>24 fee that Taft will take in in this case will</p> <p>25 impact one way or the other the compensation</p>	<p style="text-align: right;">Page 37</p> <p>1 mean to be offensive about it, but that's --</p> <p>2 your understanding of why I'm asking the</p> <p>3 question is not so relevant, you just need to</p> <p>4 answer the questions unless your attorney</p> <p>5 instructs you not to answer. That's how this</p> <p>6 works.</p> <p>7 A. Okay. Could you read the question</p> <p>8 back to me again, please?</p> <p>9 (Record read.)</p> <p>10 THE WITNESS: No.</p> <p>11 BY MR. SCHEIER:</p> <p>12 Q. Do you know whether your service</p> <p>13 as the trustee of the Antioch Litigation Trust</p> <p>14 comes under any insurance coverage that the</p> <p>15 Taft law firm has purchased?</p> <p>16 A. I don't know that.</p> <p>17 Q. You can put that exhibit aside</p> <p>18 now.</p> <p>19 A. Very good.</p> <p>20 Q. Now is about the time for me to</p> <p>21 introduce myself to you, Mr. Miller, because</p> <p>22 we're going to be talking about my clients.</p> <p>23 I'm Mike Scheier, and I represent Lee Morgan,</p> <p>24 Asha Moran, Marty Moran, Chandra Attiken, and a</p> <p>25 series of Morgan family-related trusts that</p>

<p style="text-align: right;">Page 38</p> <p>1 have been named as defendants in the case.</p> <p>2 A. Very good.</p> <p>3 Q. And for the next segment of the</p> <p>4 deposition I'm going to ask you some questions</p> <p>5 about my clients.</p> <p>6 A. Okay.</p> <p>7 Q. The first one I'd like to talk to</p> <p>8 you about is Marty Moran.</p> <p>9 A. Okay.</p> <p>10 Q. And maybe to help us with this</p> <p>11 segment of my cross-examination we'll take a</p> <p>12 look at the amended complaint in this case. My</p> <p>13 understanding is it's been previously marked as</p> <p>14 Exhibit 42 --</p> <p>15 A. Okay.</p> <p>16 Q. -- so why don't we treat it as</p> <p>17 such.</p> <p>18 A. Very good.</p> <p>19 Q. Mr. Miller, I understand that you</p> <p>20 reviewed this complaint in preparation for your</p> <p>21 deposition; is that right?</p> <p>22 A. I did.</p> <p>23 Q. And did you review the amended</p> <p>24 complaint before it was filed with the court?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 40</p> <p>1 officers and directors with respect to the</p> <p>2 LEVIMO transaction, please?</p> <p>3 A. Again, based on my review of</p> <p>4 the -- primarily the deposition exhibits and,</p> <p>5 as I've indicated, certain parts of certain</p> <p>6 depositions, it appeared to me from the Trust</p> <p>7 perspective that Mr. Moran was very much</p> <p>8 actively involved in the LEVIMO transaction</p> <p>9 and, in fact, manages that real estate, as I</p> <p>10 understand it, for -- for LEVIMO. That -- you</p> <p>11 know, I think the Trust's view of that</p> <p>12 transaction is that it was not a proper thing</p> <p>13 for the --</p> <p>14 Q. Well, I'm asking about Marty</p> <p>15 Moran, not the Trust's view on the transaction,</p> <p>16 so let's stick with the question asked in the</p> <p>17 meantime.</p> <p>18 What specific facts can you</p> <p>19 identify for me that support the allegation</p> <p>20 that Marty Moran specifically participated in</p> <p>21 what the Trust calls the LEVIMO transaction?</p> <p>22 A. I believe that there are</p> <p>23 documents, e-mail exchanges, et cetera, about</p> <p>24 that building and about the transaction and the</p> <p>25 lease. My recollection of the documents is</p>
<p style="text-align: right;">Page 39</p> <p>1 Q. And did you authorize your counsel</p> <p>2 to file this amended complaint?</p> <p>3 A. Yes.</p> <p>4 Q. If you could turn to page</p> <p>5 forty-three of the complaint --</p> <p>6 A. Okay.</p> <p>7 Q. -- which is Exhibit 42. You'll</p> <p>8 see there's a count four and a count five</p> <p>9 relating to something known as the LEVIMO</p> <p>10 transaction.</p> <p>11 A. Uh-huh.</p> <p>12 Q. Do you see that?</p> <p>13 A. Yes, I do.</p> <p>14 Q. You'll notice that my client Marty</p> <p>15 Moran is named as a defendant in count five?</p> <p>16 A. Yes.</p> <p>17 Q. And you and your lawyers have</p> <p>18 accused him of aiding and abetting breach of</p> <p>19 fiduciary duty with respect to the LEVIMO</p> <p>20 transaction. Do you see that?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. Can you describe for me all</p> <p>23 facts that the Trust knows of that support the</p> <p>24 allegation that Mr. Moran aided and abetted in</p> <p>25 breaches of fiduciary duty by corporate</p>	<p style="text-align: right;">Page 41</p> <p>1 that he may have been copied on the documents</p> <p>2 pertaining to the LEVIMO lease. The documents</p> <p>3 at least certainly indicate that he was</p> <p>4 involved and facilitating the transaction on</p> <p>5 the LEVIMO side. And, again, the allegation is</p> <p>6 that he facilitated the board in breaches of</p> <p>7 fiduciary duty, and the Trust's view is that</p> <p>8 the board breached their fiduciary duty by</p> <p>9 entering into that transaction with LEVIMO.</p> <p>10 Q. My question is, can you identify</p> <p>11 for me any specific action on the part of</p> <p>12 Mr. Moran that indicates he participated in the</p> <p>13 LEVIMO transaction based on the documents that</p> <p>14 you reviewed in preparation for this</p> <p>15 deposition?</p> <p>16 A. Well, again, without the documents</p> <p>17 in front of me, my recollection of them is that</p> <p>18 there is back -- that he is involved in</p> <p>19 connection</p> <p>20 with -- on behalf of LEVIMO getting that lease</p> <p>21 transaction done and then subsequently managing</p> <p>22 the property on a go-forward.</p> <p>23 Q. What -- since you were supposed to</p> <p>24 prepare for this deposition and one of the</p> <p>25 topics, which was specifically topic five, you,</p>

<p style="text-align: right;">Page 42</p> <p>1 was all facts in the Trust knowledge that  2 support your allegations in the aiding and  3 abetting LEVIMO transaction count --  4 A. Uh-huh.  5 Q. -- I'll try it one more time.  6 What was Mr. Moran's involvement? What facts  7 does the Trust have that, in fact, Mr. Moran  8 was involved in negotiating the LEVIMO  9 transaction?  10 A. Again, I think we'd have to look  11 through the documents. I believe we've got and  12 brought documents here today to go through and  13 look at, and we can go through and do that --  14 Q. Okay.  15 A. -- and that's what -- you know,  16 that's what we want to do.  17 Q. That's fine.  18 A. Make sure that you're aware of  19 that.  20 MR. SCHEIER: You want to go off the  21 record and have him get those documents?  22 MS. ANDREW: Yes.  23 THE VIDEOGRAPHER: We're off the  24 record.  25 (Pause in proceedings.)</p>	<p style="text-align: right;">Page 44</p> <p>1 which he may be copied or involved, let's see,  2 with respect to rent amounts in May of '08.  3 Q. Other than -- do you have the date  4 on Exhibit 317?  5 A. Yeah. It looks like the e-mail is  6 July 18th, 2007.  7 Q. And do you know the date that the  8 LEVIMO transaction closed?  9 A. Let's look. It was in April  10 of '07.  11 Q. Are you able to identify any  12 conduct on Marty Moran's part that occurred  13 prior to the closing of the LEVIMO transaction  14 that support the Trust claims that he aided and  15 abetted board members in their breaches of  16 fiduciary duty in entering into that  17 transaction?  18 A. Not based on -- I mean, beyond  19 what I've just pointed out here, no; but this  20 clearly -- the documents here are not the  21 entire universe and, you know, I think the  22 impression that the Trust had from these  23 documents is that -- or at least the e-mail  24 exchanges, that he was actively involved in the  25 management of the real estate.</p>
<p style="text-align: right;">Page 43</p> <p>1 THE VIDEOGRAPHER: We're on the  2 record.  3 BY MR. SCHEIER:  4 Q. Sir, have you had a chance to  5 review the documents?  6 A. I have. And I think what we have  7 here is Exhibit Number 317, which is an e-mail  8 that looks like it was done -- e-mail exchange  9 shortly after the transaction in July 17th as  10 between Ole Dam and Mr. Morgan with respect to  11 excess space in the property that was sold in  12 the LEVIMO transaction and several references  13 to Marty being involved with respect to showing  14 the property, et cetera. And it looks like  15 there's an e-mail from him here, essentially  16 information geared toward, you know, managing  17 the real estate with respect to this.  18 Q. And that's managing the real  19 estate after the transaction closed?  20 A. Shortly after. It looks like to  21 me it would have been in the -- shortly after  22 that the transaction closed.  23 Q. I --  24 A. And then there were subsequent  25 e-mails with respect to defaults, I think, in</p>	<p style="text-align: right;">Page 45</p> <p>1 Q. And that would be after the  2 transaction closed, correct?  3 A. That's when that e-mail is dated.  4 Q. I'm trying to find out when you  5 understand the Trust understood that Mr. Moran  6 was actively involved in the management of the  7 real estate. That was after the transaction  8 closed?  9 MS. ANDREW: Object to form.  10 BY MR. SCHEIER:  11 Q. Well --  12 A. The e-mail was dated after the  13 transaction.  14 Q. Unrelated to the e-mail.  15 A. Okay.  16 Q. The Trust does not allege that --  17 the Trust's allegation with regard to Mr.  18 Moran's management of the real estate --  19 A. Yeah.  20 Q. -- is that based on your review of  21 documents, that occurred after the transaction  22 closed?  23 A. Based on what I've seen here, yes.  24 Q. Okay. And you fully prepared  25 pursuant to the notice of deposition, correct?</p>

<p style="text-align: right;">Page 46</p> <p>1 A. Again, I've reviewed a lot of -- a 2 lot of documents. 3 Q. Okay. 4 A. It's possible I've seen something 5 and have simply forgotten it. 6 Q. When did you review the documents? 7 A. Well, a lot of them within the 8 last few days. Some of them -- 9 Q. Okay. Very well. Other than 10 Exhibit 317 which was dated a number of months 11 after the transaction, can you identify any 12 document at all that indicates Mr. Moran 13 participated in any way in arranging the LEVIMO 14 transaction or assisting the board with regard 15 to the LEVIMO transaction prior to April of 16 2007? 17 A. Not as I sit here presently. 18 Q. And how about as you reviewed the 19 documents over the last few days to prepare for 20 this deposition on this topic? 21 A. My recollection was that I had 22 seen something that was prior to the closing. 23 Q. Okay. Then we need to go off the 24 record and you need to find that for me, 25 please.</p>	<p style="text-align: right;">Page 48</p> <p>1 Antioch Company. Did I hear you correctly? 2 A. I don't know if I used the word 3 unfair, but -- 4 Q. Well, then let's talk about that. 5 A. Okay. 6 Q. Do you believe the LEVIMO 7 transaction was in some way unfair to The 8 Antioch Company? 9 A. I think our view of it was that it 10 was a breach of the director's fiduciary duties 11 to have entered into that transaction with 12 LEVIMO given -- 13 Q. My question, sir -- 14 A. Okay. 15 Q. -- is whether the Trust's view is 16 the LEVIMO transaction and its terms were 17 unfair to The Antioch Company? 18 A. And my answer is that given where 19 the company had been and where it was at at 20 that time and appeared to be going, that 21 entering into a transaction where the Morgan 22 family, through the LEVIMO entity, became the 23 owner of and landlord to what was probably one 24 of the most significant assets of the company 25 was not a prudent thing or was not something</p>
<p style="text-align: right;">Page 47</p> <p>1 THE VIDEOGRAPHER: We're off the 2 record. 3 (Pause in proceedings.) 4 THE VIDEOGRAPHER: We're on the 5 record. 6 BY MR. SCHEIER: 7 Q. Mr. Miller, on that last break 8 were you able to find the document that you 9 thought you saw where Mr. Moran was involved in 10 the LEVIMO transaction before April of 2007? 11 A. I was not, and I may have been 12 mistaken. 13 Q. Okay. Thank you. Do you know of 14 any facts indicating that Mr. Moran negotiated 15 the LEVIMO transaction on LEVIMO's behalf with 16 any member of the board? 17 A. No, I do not. 18 Q. And do you know of any facts that 19 Mr. Moran promoted the LEVIMO transaction among 20 any members of the board of directors? 21 A. As I sit here today and based on 22 what I've reviewed, no, I don't. 23 Q. Thank you. Can you -- I think I 24 heard you say earlier that in the Trust's view, 25 the LEVIMO transaction was unfair to The</p>	<p style="text-align: right;">Page 49</p> <p>1 that the board should have done. 2 Q. And why not? 3 A. Well, because the company was in, 4 at that juncture, fairly severe financial 5 distress. They were in the spring of '07. 6 They are -- have bank debt that is maturing 7 soon. They've been told that they cannot 8 extend and the bank won't extend that bank debt 9 unless there's a significant pay-down. They 10 are unable to get a clean audit because of 11 that; and that financial situation, in the 12 Trust's view, is driven by the 2003 ESOP 13 transaction and everything that followed on 14 that. And the other things that followed on 15 that were continuing management by Lee Morgan 16 and the Morgan family that watched the sales 17 and performance of the company consistently 18 deteriorate from possibly as late as -- as 19 early as 2002. 20 Q. Mr. Miller, I -- 21 A. I'm not done with my answer. 22 Q. No, here's the question. You're 23 not answering my question and when your lawyer 24 wants to direct examine you on the record, you 25 can answer her questions.</p>



<p style="text-align: right;">Page 50</p> <p>1 My question is, can you point to 2 any provision of the LEVIMO lease that was 3 unfair to The Antioch Company? 4 MS. ANDREW: All right. Well, that's 5 a different question than the one he was answering 6 which was why he -- why he, the Trust, thought 7 that the transaction was not a good transaction 8 for the company -- 9 MR. SCHEIER: The question -- 10 MS. ANDREW: -- and he was answering 11 and you cut him off. 12 MR. SCHEIER: The question was 13 whether it was fair or -- what was unfair about 14 the transaction of the company. That was the 15 question. 16 MS. ANDREW: That was not the 17 question he was answering. 18 MR. SCHEIER: Well, that's the 19 question that was asked -- 20 MS. ANDREW: No, I would like -- 21 MR. SCHEIER: -- so -- 22 MS. ANDREW: -- her to read it back 23 and let him finish answering the question. 24 MR. SCHEIER: Well, no, it's my 25 deposition and at this point --</p>	<p style="text-align: right;">Page 52</p> <p>1 it's on page forty-five. And in count seven of 2 page forty-five the Trust alleges that 3 Mr. Moran aided the board of directors in 4 breaching fiduciary duty with respect to the 5 sale process. Do you see that, Mr. Miller? 6 A. Yes. 7 Q. Can you describe for me all facts 8 within the Trust's knowledge that it gained 9 from discovery in this case that supports the 10 allegation that Mr. Moran aided and abetted any 11 member of The Antioch Company special 12 transaction committee in regard to any alleged 13 breaches of fiduciary duties on their part? 14 A. Yeah. I think with respect to the 15 sale process, my recollection of the exhibits 16 is that there are more of those, and in 17 particular I'm thinking in the May 2008 time 18 frame, where Mr. Moran was engaged, and I 19 believe that there may be earlier e-mails as 20 well, where he and he through ClearPath are 21 engaged in connection with Candlewood and 22 Mr. Morgan with respect to making proposals to 23 the special committee that had the effect of, 24 in the Trust's view, stalling, hindering a sale 25 process, a sale of the company, a change of</p>
<p style="text-align: right;">Page 51</p> <p>1 MS. ANDREW: But you're not allowed 2 to interrupt the witness. 3 MR. SCHEIER: Then I'll withdraw the 4 last question. 5 BY MR. SCHEIER: 6 Q. And the question is, can you point 7 to any provision in the LEVIMO lease or the 8 LEVIMO transaction that was unfair to The 9 Antioch Company? 10 A. Well, again, consistent with the 11 earlier answer, I think the biggest part of the 12 unfairness is putting the Morgans in that 13 position of control at that point in time 14 through that lease. 15 Q. Okay. Other than the fact that 16 the Morgans had an interest in the LEVIMO 17 transaction, can you point to any other term of 18 that lease that was unfair to The Antioch 19 Company? 20 A. No, not as I sit here today. 21 Q. Are you aware of any other -- 22 strike that. 23 I'm sticking now back with 24 Mr. Moran. I'd like to move to another count 25 that he's named in, and that's count seven and</p>	<p style="text-align: right;">Page 53</p> <p>1 control transaction, and that there is e-mail 2 traffic to that effect within those time 3 frames. 4 Q. Anything other than Mr. Moran's 5 service to Candlewood through ClearPath that 6 you can point to that supports your allegation 7 that Mr. Moran aided and abetted any of the 8 special transaction committee members in 9 alleged breaches of their fiduciary duty with 10 respect to the sale process? 11 A. Again, these proposals that he 12 from the e-mail exchanges appear to have been 13 involved in facilitating or pursuing were 14 submitted to the special committee and the 15 special committee -- and there was a lengthy 16 process of that, going back to the late October 17 2007 time frame, where the intent or approach 18 seemed to be to forestall a change of control 19 or sale process. 20 Q. Did Mr. -- do you have any facts 21 that Mr. Moran negotiated directly with any 22 member of the special transaction committee on 23 behalf of Candlewood or ClearPath or 24 Mr. Morgan? 25 A. I don't think I've seen anything</p>

<p style="text-align: right;">Page 54</p> <p>1 with respect to specific negotiations.</p> <p>2 Q. What facts does the Trust know</p> <p>3 about Mr. Moran's specific conduct in assisting</p> <p>4 Candlewood with regard to making proposals to</p> <p>5 the special transaction committee?</p> <p>6 A. Well, again, I think we do that by</p> <p>7 reference to the e-mails; but I believe that</p> <p>8 there's certainly e-mails in the May '08 time</p> <p>9 frame with -- there's a proposal geared toward</p> <p>10 paying off the ESOP notes or backstopping the</p> <p>11 ESOP notes that I believe Mr. Moran was</p> <p>12 involved in, if I recall correctly. And there</p> <p>13 may have been earlier exchanges in the 2008</p> <p>14 time frame with respect to earlier offers,</p> <p>15 possibly the GSC deal. That one I'm a little</p> <p>16 fuzzy on. I'd need to look at the documents.</p> <p>17 Q. Okay. Anything other than</p> <p>18 Mr. Moran suggesting or assisting in an effort</p> <p>19 to negotiate, as you term it, backstopping the</p> <p>20 ESOP notes that you can identify that supports</p> <p>21 the allegation that he aided and abetted The</p> <p>22 Antioch Company board members in breaching</p> <p>23 their fiduciary duty in regard to the sale</p> <p>24 process?</p> <p>25 A. Again, I guess we could look at</p>	<p style="text-align: right;">Page 56</p> <p>1 MR. GENTRY: Thank you.</p> <p>2 THE WITNESS: Exhibit 331. Exhibit</p> <p>3 332. Exhibit 333. Let's see. Exhibit 321.</p> <p>4 Exhibit 320.</p> <p>5 MR. SCHEIER: Go off the record a</p> <p>6 moment.</p> <p>7 THE VIDEOGRAPHER: We're off the</p> <p>8 record.</p> <p>9 (Thereupon, an off-the-record</p> <p>10 discussion was had.)</p> <p>11 THE VIDEOGRAPHER: We're on the</p> <p>12 record.</p> <p>13 BY MR. SCHEIER:</p> <p>14 Q. To my understanding is you've</p> <p>15 identified another four exhibits in addition to</p> <p>16 the ones that you read in the record</p> <p>17 previously, and those are Exhibits 323, 746,</p> <p>18 324, and 309?</p> <p>19 A. Correct.</p> <p>20 Q. Okay. Other than all the exhibits</p> <p>21 you just read off and put into the record, are</p> <p>22 there any other documents that you reviewed</p> <p>23 that support the Trust's claims against</p> <p>24 Mr. Moran in count seven?</p> <p>25 A. No, those are the ones that I</p>
<p style="text-align: right;">Page 55</p> <p>1 the specific e-mails.</p> <p>2 Q. Okay. Let's go off the record and</p> <p>3 do that.</p> <p>4 A. Okay.</p> <p>5 THE VIDEOGRAPHER: We're off the</p> <p>6 record.</p> <p>7 (Pause in proceedings.)</p> <p>8 THE VIDEOGRAPHER: We're on the</p> <p>9 record.</p> <p>10 BY MR. SCHEIER:</p> <p>11 Q. Mr. Miller, were you able to</p> <p>12 identify any documents that support the Trust's</p> <p>13 allegations that Mr. Moran in any way aided and</p> <p>14 abetted any members of The Antioch Company</p> <p>15 board of directors in respect to the alleged</p> <p>16 breaches of fiduciary -- breaches of fiduciary</p> <p>17 duty with regard to the sale process?</p> <p>18 A. Yes.</p> <p>19 Q. And can you identify those by</p> <p>20 exhibit number if possible?</p> <p>21 A. Yes. Exhibit 203. Exhibit 204.</p> <p>22 Let's see, what is this one? Exhibit 243.</p> <p>23 Exhibit 231. Exhibit 244. Exhibit 276.</p> <p>24 MR. GENTRY: I'm sorry, was that 276?</p> <p>25 THE WITNESS: Yes, 276.</p>	<p style="text-align: right;">Page 57</p> <p>1 reviewed.</p> <p>2 Q. Thank you. Now I'd like you to</p> <p>3 turn your attention to count ten, which is the</p> <p>4 last of the three counts where you sued</p> <p>5 Mr. Moran. And that count is tortious</p> <p>6 interference with business contracts with</p> <p>7 respect to the sales process. Do you see that?</p> <p>8 It's on page forty-seven of the complaint.</p> <p>9 A. Okay. Yes.</p> <p>10 Q. What facts does the Trust have to</p> <p>11 support its allegation that Mr. Moran</p> <p>12 tortiously interfered with the agreement</p> <p>13 between Houlihan Lokey and The Antioch</p> <p>14 Company --</p> <p>15 A. Again --</p> <p>16 Q. -- in the 2007 and 2008 time</p> <p>17 frame?</p> <p>18 A. Again as reflected in certain of</p> <p>19 the documents or the exhibits whose numbers I</p> <p>20 just gave you, it appears that Mr. Moran was</p> <p>21 actively engaged in the retention of</p> <p>22 Houlihan -- I'm sorry, of Candlewood and --</p> <p>23 both on the front end and even renegotiating, I</p> <p>24 guess, toward the back end and also -- and I</p> <p>25 think the notion there is, you know, Candlewood</p>

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1 came into that situation and, in our view,  
2 interfered with -- in the Trust's view, I  
3 should say, interfered with the existing  
4 relationship contract between the company and  
5 Houlihan with respect to a sale process. And  
6 it appears from the e-mail traffic and notes, I  
7 guess one of those is the notes of a meeting,  
8 that Mr. Moran was actively engaged or involved  
9 in bringing Candlewood into -- into the  
10 situation.

11 Q. Other than what you've just  
12 testified to, does the Trust know of any facts  
13 that supports an allegation that Mr. Moran  
14 somehow interfered with either Houlihan or The  
15 Antioch Company's ability to execute their  
16 obligations under the engagement letter between  
17 The Antioch Company and Houlihan?

18 A. Well, and, again, I think in the  
19 May time frame at least there appeared to me to  
20 be e-mail or exchange with respect to, you  
21 know, competing proposals submitted, and that  
22 would be in addition -- you know, an additional  
23 item.

24 Q. Can you identify any specific  
25 communications or documents that support the

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1 Trust's claims that Mr. Moran tortiously  
2 interfered with the contract between Houlihan  
3 and the company other than the list of exhibits  
4 you read off beforehand?

5 A. Based on everything that I've  
6 reviewed, those are the ones that demonstrate  
7 his involvement or show his involvement.

8 Q. Are you aware of any facts that,  
9 in fact, the company breached its agreement  
10 with Houlihan?

11 A. Well, I think that bringing  
12 Candlewood into the situation, in the Trust's  
13 view, was a breach of the exclusivity provision  
14 in the Houlihan arrangement.

15 Q. Do you know of any facts that  
16 Houlihan shares the Trust's view? Have you  
17 seen any documents or testimony indicating that  
18 Houlihan shares the Trust's view in this  
19 litigation that the exclusivity provision was  
20 breached?

21 A. I don't believe that I've seen  
22 documents to that effect. There was certainly  
23 some -- I believe there were some e-mails back  
24 and forth as to the Houlihan/Candlewood  
25 relationship but --

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1 Q. Have you seen any documents or  
2 testimony indicating that Houlihan believed The  
3 Antioch Company breached its agreement with  
4 Houlihan?

5 A. As I sit here today, I don't  
6 recall seeing any documents to that effect.

7 Q. Tim, other than what we've talked  
8 about over the last forty-five minutes or so  
9 with regard to Mr. Moran and the three counts  
10 where he's named as a defendant, can you think  
11 of any other specific act by Mr. Moran that  
12 damaged The Antioch Company?

13 A. I think, again, based on a review  
14 of the deposition exhibits, that's -- those are  
15 the items. That's the information that we  
16 have -- that I have presently.

17 Q. I'd like now to move to my client  
18 Chandra Attiken. The Trust has sued her for  
19 alleged conduct relating to both the 2003 ESOP  
20 transaction and the sale process that occurred  
21 in 2007 and 2008. I'll represent that to you.

22 I'd like to start first with the  
23 sale process in 2007 and 2008; and in that  
24 regard, I'd like to have you turn your  
25 attention to page forty-four of the amended

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1 complaint, count six. And when you get there,  
2 let me know.

3 A. I'm there.

4 Q. Okay. Count six alleges that --  
5 alleges that Miss Attiken directly breached her  
6 fiduciary duty as an officer of The Antioch  
7 Company in respect to the sale process. Do you  
8 see those allegations?

9 A. Yes.

10 Q. Okay. Can you describe for me all  
11 facts that you're aware of that support the  
12 allegation that any conduct on Miss Attiken's  
13 behalf constituted a breach of her fiduciary  
14 duty to The Antioch Company in regard to the  
15 sale process, please?

16 A. Once again I think we're going to  
17 need to look at the documents. She was an  
18 officer of the company. She was --

19 Q. Do you know what her title was in  
20 that time frame?

21 A. I understood that she was a vice  
22 president or director of human resources --

23 Q. Very well.

24 A. -- and would have had the -- dealt  
25 with the various employees leaving,

16 (Pages 58 to 61)

<p style="text-align: right;">Page 62</p> <p>1 terminating, that sort of stuff.  2 Q. Do you want to look at documents?  3 A. I guess we can. Yeah, that would  4 be fine.  5 Q. Thank you.  6 MR. SCHEIER: Go off the record,  7 please.  8 THE VIDEOGRAPHER: We're off the  9 record.  10 (Pause in proceedings.)  11 THE VIDEOGRAPHER: We're on the  12 record.  13 BY MR. SCHEIER:  14 Q. Mr. Miller, are you able to  15 identify any documents that in your view  16 support the Trust's claim that Miss Attiken  17 breached her fiduciary duty as the director or  18 the vice president of human resources to the  19 company?  20 A. Yes. The documents that we have  21 are Exhibit 219, 288, and then 196 and 311.  22 Q. Okay. Any others that you've seen  23 in the binders, other than those four  24 documents, that support your claims against  25 Miss Attiken in count six?</p>	<p style="text-align: right;">Page 64</p> <p>1 Q. Well, I understand, but I'm not  2 making the claims.  3 A. Okay. Sure.  4 Q. What I need to know, sir --  5 A. No, I understand.  6 Q. -- is whether you're relying --  7 A. Sure.  8 Q. -- on anything other than those  9 four documents to support your claims against  10 Miss Attiken as alleged in count six.  11 A. At this juncture, this is what  12 we're aware of in addition to, just generally  13 speaking, her role in the company as to those  14 claims, et cetera.  15 Q. Well, what specifically about her  16 role in the company are you relying upon?  17 A. She's an officer of the company  18 and in that capacity, it looks like from the  19 documents, she was involved in hiring the ESOP  20 trustee that came in that was Reliance.  21 Reliance made a rather noisy withdrawal.  22 Again, as head of HR, she had a role there.  23 One of the overriding themes or issues here, in  24 the Trust's view, is the fact that various  25 people who could have spoken up did not speak</p>
<p style="text-align: right;">Page 63</p> <p>1 A. These are the ones that we've been  2 able to identify --  3 Q. Okay.  4 A. -- today.  5 Q. Do you -- does the trust -- has  6 the Trust gained knowledge of any facts through  7 discovery through -- strike that.  8 Has the Trust gained knowledge of  9 any facts through discovery, other than the  10 four documents you've identified, that support  11 your claims against Miss Attiken in count six?  12 A. I think the four documents and,  13 you know, her position, role, et cetera at the  14 company, those are what we know now.  15 Q. Well, discovery is closed --  16 A. Okay. Yes.  17 Q. -- so I'm asking you now that  18 discovery is closed --  19 A. That's --  20 Q. -- is the four documents that you  21 just --  22 A. These were the ones that were  23 identified, yes, but we've produced thousands  24 of pages of documents in discovery. You have  25 everything we have.</p>	<p style="text-align: right;">Page 65</p> <p>1 up.  2 Q. Other than that, what you've just  3 stated and the documents you've referenced, is  4 there any other facts that the Trust gained  5 knowledge of through the full discovery process  6 that support the claims in count six against  7 Miss Attiken?  8 A. Again, as I sit here today, this  9 is what I'm aware of. Yes, this is what I've  10 seen.  11 Q. You've also sued Miss Attiken in  12 count seven for aiding and abetting the board's  13 breach of fiduciary duty with regard to the  14 sales process. Are there documents other than  15 the four that you mentioned previously in  16 support of count six that support your aiding  17 and abetting claim?  18 A. Again, I think that -- I think  19 that that is it. Let's see. There's another  20 that -- well -- that might bear on it. 290.  21 Let's add that to the list --  22 Q. Okay.  23 A. -- but it's not dated.  24 Q. Can I see 290? Thank you. So  25 your testimony in regard to facts that the</p>

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1 Trust learned through the essential discovery  
2 process in support of count six are the same  
3 facts that support the claims in count seven  
4 for aiding and abetting the board's alleged  
5 breach of fiduciary duty with regard to the  
6 sale process; is that right?

7 A. Yes.

8 Q. Okay. Moving on to the 2003  
9 transaction, the allegation against Miss  
10 Attiken, what specific facts are you aware of  
11 that support an allegation in count one that's  
12 on page forty of the amended complaint, Exhibit  
13 42, that Miss Attiken breached her fiduciary  
14 duties to the company as a corporate officer in  
15 respect to the 2003 transaction?

16 A. She appears to have been heavily  
17 involved in the communication process in terms  
18 of communicating the transaction to the  
19 employees, and in that regard had -- appears to  
20 have had a fair amount of access to  
21 information, at least is my recollection.

22 She also received consideration in  
23 connection with that transaction in excess of  
24 four hundred thousand dollars, I believe, as  
25 well as possibly subordinated note and

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1 warrants.

2 As head of HR and as a member of  
3 the ESOP advisory committee, again, this goes  
4 to the issue of people in positions to say,  
5 hey, wait a minute, should we be doing this,  
6 she appears to us and to the Trust who have  
7 been in that position and should have -- with  
8 somebody who should have had access to that  
9 level of information and certainly with respect  
10 to things like the repurchase obligations and  
11 that sort of stuff, you know, I think the  
12 Trust's view is that she was in a position to  
13 know these things and to have raised issues  
14 about them but she had a personal financial  
15 interest in not doing so, it appears to us.

16 Q. Can you identify any facts that  
17 indicate Miss Attiken was involved in the  
18 negotiation of the 2003 transaction?

19 A. The negotiation of the 2003  
20 transaction? That would assume that there was  
21 a negotiation. She was head of HR.

22 Q. Well, if you believe there wasn't  
23 any, say so.

24 A. I mean, she was head of HR at the  
25 time.

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1 Q. Uh-huh.

2 A. And, as I said, I think -- I don't  
3 recall seeing anything that showed her in the  
4 negotiations but, I -- I would -- I'd have to  
5 look back at the board meeting minutes to see  
6 and who all was there, but I don't --

7 Q. Well, I'm very sorry to do this,  
8 Tim, but you've alleged many millions of  
9 dollars of damage against these people,  
10 including Miss Attiken, so if you need to take  
11 another break so you can look through the board  
12 minutes, then let's do that. Shall we?

13 MS. ANDREW: If that's a document you  
14 need to see to refresh your recollection.

15 BY MR. SCHEIER:

16 Q. Well, I'm not asking you to  
17 refresh your recollection. I want to know what  
18 evidence the Trust has that Miss Attiken was  
19 involved in the negotiation or the development  
20 of the 2003 transaction and its terms; and with  
21 that question in mind, if you need to look at  
22 documents, then let's take a break and do so.

23 A. As I sit here right now, I  
24 don't -- I don't recall seeing her involvement  
25 in the negotiation of the terms to the extent

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1 that -- and, again, I'm not convinced there was  
2 necessarily a negotiation, per se. There were  
3 meetings held. There were --

4 Q. Well, then let's -- do you have --  
5 I'd like to know if you can identify any  
6 meeting that Miss Attiken was involved in  
7 relating to the 2003 transaction where anyone  
8 representing the ESOP and anyone representing  
9 the company was involved.

10 A. So you're talking about a  
11 negotiation between the ESOP trustee and the  
12 company. I'm not following the question.

13 Q. I'm trying to understand what Miss  
14 Attiken did that was wrong that supports your  
15 claim with regard to the 2003 transaction.

16 A. Well, I think our view of it is  
17 that she had knowledge of the transaction. As  
18 the HR person, she should have had some  
19 knowledge of the ESOP and how it worked. And  
20 the fact that people who had cashed out of the  
21 ESOP, and that she or somebody should have  
22 raised their hand and said, hey, wait a minute,  
23 if we see all of upper management taking large  
24 dollars out of the company and we have an  
25 ability to do the same thing, you know, isn't

18 (Pages 66 to 69)



<p style="text-align: right;">Page 70</p> <p>1 there a decent likelihood that we're going to 2 do that.</p> <p>3 And it's not clear to me, as I 4 look at this transaction, there's many 5 references to a significant repurchase 6 liability but then -- and there's a lot of 7 dollars going out to a lot of people but nobody 8 seems to step up and say, hey, wait a minute, 9 don't you think that when all of our upper 10 management and Miss Attiken herself and others 11 take large dollars out, don't you think that 12 other people in the company if they can do that 13 are going to want to do that. And I don't see 14 where she stood up and said, hey, wait a 15 minute, we shouldn't be doing this --</p> <p>16 Q. Okay.</p> <p>17 A. -- or maybe we should give some 18 further consideration to that.</p> <p>19 Q. Other than her failure to stand up 20 and say let's not do this or maybe let's give 21 it further consideration, can you identify any 22 fact that gives rise to evidence that supports 23 the claim that Miss Attiken breached her 24 fiduciary duty of the company?</p> <p>25 A. Again, with the -- I thought that</p>	<p style="text-align: right;">Page 72</p> <p>1 transaction because she held nonESOP shares?</p> <p>2 A. I don't know whether that was 3 through shares or whether those were options 4 that she was able to execute, but clearly the 5 documents indicate that she took -- she had 6 shares that she exchanged or were purchased.</p> <p>7 Q. And third is she had some duty, in 8 your mind, to stand up and say something about 9 the nature of the transaction and the effect it 10 might have on the company?</p> <p>11 A. Big picture, yes. Broad brush, 12 yes, I think that covers it.</p> <p>13 Q. Okay. Other than those three 14 points, is there anything else, any other facts 15 that you can testify to today on behalf of the 16 Trust that supports claims in counts one and 17 two against Miss Attiken?</p> <p>18 A. Not as I sit here today.</p> <p>19 Q. Thank you. While we're on the 20 2003 transaction, do you know the date that 21 they closed?</p> <p>22 A. December 16th, 2003.</p> <p>23 Q. Does the Trust take the position 24 that the statute of limitations has not run on 25 that transaction?</p>
<p style="text-align: right;">Page 71</p> <p>1 she was involved in connection with the 2 communication package, the train-the-trainer 3 sort of stuff and the things that went to 4 ultimately the employees and the ESOP 5 participants with respect to their vote.</p> <p>6 Q. Okay.</p> <p>7 A. I would -- I need to see a 8 document or two on that one to confirm it; but 9 that's my recollection of my review of the 10 documents that as HR person, she was involved 11 in that.</p> <p>12 Q. So my understanding is the facts 13 that you have in support of a claim against 14 Miss Attiken in counts one and two for 15 breaching a duty in regard to the 2003 16 transaction and aiding and abetting breaches of 17 duty are as follows: She was involved in the 18 communication of the terms of the transaction 19 to employee-owners; is that right?</p> <p>20 A. That's my recollection of the 21 documents as I sit here, yes --</p> <p>22 Q. Okay.</p> <p>23 A. -- but as I said, I'd want to see 24 it.</p> <p>25 Q. That she participated in the</p>	<p style="text-align: right;">Page 73</p> <p>1 A. We take the position that the 2 statute of limitations should be equitably 3 tolled.</p> <p>4 Q. Okay. Is it the Trust's view that 5 the statute of limitations began running at any 6 time on the 2003 transaction?</p> <p>7 A. No. I mean, I think from -- 8 inasmuch as the bankruptcy tolled, did the 9 statute of limitations, I think the Trustee's 10 position is -- the Trust's position is all of 11 the folks that were in a position to do 12 something about this did not do something about 13 it.</p> <p>14 Q. So the Trust takes the position 15 that the statute has not yet begun to run?</p> <p>16 A. Well, I guess, you know, once the 17 bankruptcy is filed and, you know, information 18 is out there; but I think our view of it is the 19 bankruptcy tolled is the running of the 20 limitations.</p> <p>21 Q. Okay. What facts do you have that 22 support the position by the Trust that the 23 statute of limitations on the 2003 transaction 24 is equitably tolled?</p> <p>25 A. Well, I think we have to look at</p>

<p style="text-align: right;">Page 74</p> <p>1 the transaction in total; but you're looking at  2 various people, board members, others who had  3 access to information about the transaction,  4 knew what had occurred in the transaction, knew  5 that the transaction -- or should have known  6 that the transaction in the Trust's view  7 violated Ohio corporate law and violated Ohio  8 fraudulent conveyance law.  9 That upon following the  10 transaction -- fairly early on following the  11 transaction the company began experiencing  12 significant financial issues; and that at any  13 point in time after the transaction, those  14 various individuals who had been involved and  15 who had profited from the transaction could  16 well have attempted to unwind it and had a  17 legal basis for doing so in the Trust's view  18 and failed to do so, and failed to do so really  19 ever. I mean, no one, you know, who was in a  20 position, and that includes counsel and that  21 includes, you know, board members, you know,  22 did anything about that, and that includes  23 officers of the company.  24 Q. Any -- do you have any other facts  25 that support the Trust's equitable tolling</p>	<p style="text-align: right;">Page 76</p> <p>1 Q. By the way, are you aware the  2 banks waived that covenant default in 2004?  3 A. Oh, I'm aware that they did, yes.  4 Absolutely.  5 Q. Okay. Go ahead.  6 A. They also modified the loan  7 agreement and I believe increased the interest  8 rate on the company.  9 Q. I think you're wrong. You'll  10 notice the interest rate got better for the  11 company, as did the various ratios because the  12 company, if you study the documents,  13 Mr. Miller, will show performed way ahead of  14 schedule in terms of paying down the bank loan;  15 but go ahead with your answer, please.  16 A. Okay. Well, I would stand to be  17 corrected. If I missed it, I --  18 Q. Okay. Very well. Anything else  19 that supports the equitable tolling argument  20 other than some issue that the board members  21 didn't sue the company or seek to unwind the  22 transaction after 2003?  23 A. Well, again, not just board  24 members but as Miss Attiken, officers were  25 involved, officers saw the deterioration of the</p>
<p style="text-align: right;">Page 75</p> <p>1 position in this case?  2 A. Again, there are --  3 Q. I'm not asking you to repeat what  4 you already said. In addition to what you  5 said, are there additional facts that you can  6 testify to that support the Trust's position  7 that the statute of limitations on the 2003  8 transaction was equitably tolled?  9 A. Well, as you follow on the 2003  10 transaction, there are various things and  11 various facts that occur; and any and all of  12 those facts could have given a board member or  13 somebody a view that, hey, maybe we shouldn't  14 have done this transaction and maybe we should  15 look at unwinding it.  16 And those things are like, for  17 example, and not by way of everything possible,  18 but those things are like the significant  19 uptick in the repurchase obligation in '04, the  20 fact that the company was in default of its  21 loan documents within thirteen days after it  22 closed that transaction in December, the fact  23 that the company was in default of its  24 financial covenants in 2004 as a result of the  25 repurchase and the ESOP issues.</p>	<p style="text-align: right;">Page 77</p> <p>1 company beyond, and certainly somebody in her  2 position saw the significant outflow of  3 personnel since that transaction and that it  4 continued to occur.  5 You know, my recollection of the  6 document is eight hundred employees left  7 in '04, '05, and '06 following the transaction.  8 A hundred and ten million dollars of liability  9 in the first year and another forty in each of  10 the subsequent years, I think.  11 Q. But I'm trying to understand,  12 though, am I understanding from you that the  13 facts that equitably toll the statute is that  14 there were interested officers and directors  15 who didn't bring suit even though they could  16 have?  17 A. They all, as well as counsel; and,  18 yes, all of those folks knew or should have  19 known that there was an issue there.  20 Q. Okay. Other than the fact that  21 the officers and directors that you named as  22 defendants in this case didn't themselves bring  23 suit against the company as you did, do you  24 know of any other facts that support the  25 Trust's equitable tolling argument?</p>

<p style="text-align: right;">Page 78</p> <p>1 A. I think, as I sit here today, 2 those are, you know, big picture, those are the 3 primary things. And as I said, that breaks 4 down into, you know, there are specific 5 documents here or there that I think indicate 6 that people knew there was an issue. 7 Q. I'm with you there. 8 A. Okay. 9 Q. I understand exactly what you're 10 saying. I just want to -- 11 A. I don't want to have that -- I 12 don't want to suggest that -- 13 Q. I understand your position is 14 people knew things. 15 A. Yes. 16 Q. I just want to understand that the 17 basis for your equitable tolling argument, you 18 being the Trust, is that interested officers 19 and directors did not bring a lawsuit against 20 themselves or the company as you did later on 21 and that is why you're alleging the statute of 22 limitations had been equitably tolled? 23 A. Again, that's my -- and that is 24 consistent, I guess, with my understanding of 25 equitable tolling; but, yes, that something</p>	<p style="text-align: right;">Page 80</p> <p>1 there, let me know. 2 A. I'm here. 3 Q. Okay. You'll see interrogatory 4 two generally asks for a detail about the 5 damages that the Trust is asking for in this 6 case. 7 A. Uh-huh. 8 Q. And the first response the Trust 9 writes, the Trust previously disclosed that its 10 damages include, but are not limited to, the 11 difference between the consideration paid to 12 the selling shareholders in the -- in 2003 for 13 their shares of Antioch stock and the actual 14 fair market value of those shares. Did I read 15 that correctly? 16 A. Correct. 17 Q. Does that remain the Trust's 18 position, that that's an accurate measure of 19 damages? 20 A. It is one measure of damages, yes. 21 Q. Okay. Do you recall what the 22 share -- what the price per share was paid to 23 the nonESOP shares in the 2003 transaction? 24 A. I believe it was eight hundred and 25 fifty dollars per share.</p>
<p style="text-align: right;">Page 79</p> <p>1 should have been done and was not done and that 2 in equity those claims should be able to be 3 brought. 4 Q. Thank you. 5 (Thereupon, Exhibit 789, The Antioch 6 Company Litigation Trust's response to first set 7 of interrogatories of defendants Lee Morgan, Asha 8 Moran, Chandra Attiken, Marty Moran, and certain 9 named trust defendants directed to plaintiff The 10 Antioch Company Litigation Trust, was marked for 11 purposes of identification.) 12 BY MR. SCHEIER: 13 Q. Mr. Miller, I'm handing you what 14 I've -- oh, you can put Exhibit 42 aside for 15 now. Thank you. 16 I'm handing you what's been marked 17 as Exhibit 789. You'll see it's the Trust's 18 responses to my client's first set of 19 interrogatories. And my question is going to 20 focus on the damages-related interrogatories 21 that begin on page three and continue on 22 through page six. 23 A. Okay. 24 Q. And I want to first focus on 25 question two and the response, so when you're</p>	<p style="text-align: right;">Page 81</p> <p>1 Q. That is correct. What does the 2 Trust assert now was the fair market value of 3 the nonESOP shares that should have been paid? 4 A. In connection with the damages and 5 the damages calculations, I think the Trust's 6 view is that is something that is properly the 7 province of expert testimony, and that is 8 something that we would -- the Trust would 9 anticipate having an expert testify with 10 respect to. 11 So at this juncture, where we are 12 in the case, having not yet engaged or gone 13 forward with expert testimony -- or, you know, 14 identifying testifying experts and that sort of 15 stuff, I think our answer is with respect to 16 the damages very much remain what we've placed 17 in this interrogatory, that these are the 18 various categories of damages and that, you 19 know, through the use of a testifying expert, 20 we would expect to put specific dollar amounts 21 on that. 22 Q. And all I'm asking you for is as a 23 matter of fact -- 24 A. Uh-huh. 25 Q. -- what is the Trust's position</p>

<p style="text-align: right;">Page 82</p> <p>1 this late in the litigation, if discovery is 2 closed, as to what the fair market value of the 3 outside shares of The Antioch Company were in 4 December of 2003?</p> <p>5 A. And, again, I think that that is 6 something that is appropriate for expert 7 testimony. I am not an expert -- a valuation 8 expert.</p> <p>9 Q. Well, I'm not asking your opinion 10 of what is appropriate and what is not 11 appropriate. I'm asking you, as you sit here 12 today, can you tell me as a matter of fact what 13 the Trust's view is as to what the fair market 14 value of the outside shares of The Antioch 15 Company was in December of 2003?</p> <p>16 MS. ANDREW: Objection.</p> <p>17 THE WITNESS: Again, without expert 18 testimony, there are various points of value that 19 one could look to, and there are -- from -- in 20 terms of the facts in the case. There's the 21 valuation at the end of 2002, which was six 22 eighty, I believe.</p> <p>23 BY MR. SCHEIER:</p> <p>24 Q. Uh-huh.</p> <p>25 A. There's also the issue of</p>	<p style="text-align: right;">Page 84</p> <p>1 debt incurred by Antioch in order to finance 2 the 2003 stock purchases and subsequent 3 repurchase obligations in connection with the 4 departing employees. Do you see that?</p> <p>5 A. Uh-huh.</p> <p>6 Q. Okay. How much in interest, fees, 7 and other charges are you seeking with regard 8 to damages in this case?</p> <p>9 A. Again, that's another thing that 10 we would expect an expert to go through the 11 financials and calculate that.</p> <p>12 Q. So the Trust to date has not made 13 that calculation?</p> <p>14 A. We have not made that calculation 15 to date.</p> <p>16 Q. Okay. With regard to number 17 three, fees and expenses paid to restructuring 18 professionals as a result of the deepening 19 insolvency of Antioch. Did the Trust calculate 20 what those fees and expenses are as of today?</p> <p>21 A. Again, that's something I think 22 we'd have an expert do.</p> <p>23 Q. Well, is the answer no, 24 Mr. Miller, that the Trust has not done that 25 yet?</p>
<p style="text-align: right;">Page 83</p> <p>1 application of a lack of marketability discount 2 in terms of those shares on the eight fifty 3 itself.</p> <p>4 There's an issue of a control 5 premium with respect to the Morgans in terms of 6 the shares that they got. Should they have 7 gotten -- whatever the price was, should they 8 have gotten the full price that everybody else 9 did since they were able to maintain control.</p> <p>10 So it's a fairly complicated area. 11 It's something that I think expert testimony 12 would be most appropriate for. And from the 13 Trust's standpoint, we see various points of 14 value -- or value applied to that stock.</p> <p>15 Q. Well, as you sit here today, has 16 the Trust not made a determination yet as to 17 the fair market value of what the shares 18 were -- regardless of whether it was the 19 Morgans or other selling shareholders, was as 20 of December of 2003?</p> <p>21 A. No. That is something that we 22 would look to have an expert testify to; and 23 no, we have not. No.</p> <p>24 Q. Okay. The second category of 25 damages is interest, fees, and other charges on</p>	<p style="text-align: right;">Page 85</p> <p>1 A. The answer is no.</p> <p>2 Q. Okay. Category number five of 3 damages is the loss in enterprise value that 4 resulted from the tender offer and the sale 5 process. Do you see that?</p> <p>6 A. Yes.</p> <p>7 Q. Has -- well, first of all, can you 8 tell the jury your understanding what 9 enterprise value is in that response?</p> <p>10 A. Well, I think it would be the 11 value assigned by a third party to the 12 enterprise; and, again, this is usually done 13 through a multiple, it looks like, of EBITDA 14 and would approximate, I suppose, the approach 15 that the valuation people took in valuating -- 16 in valuing the company for the 2003 ESOP 17 transaction. But that approach was also taken 18 or at least initially indicated by certain of 19 the parties in the 2007 sale transaction in 20 terms of how they would approach a valuation of 21 it.</p> <p>22 So, again, this is something -- 23 and particularly this would be something that 24 would be the basis, in our view -- in the 25 Trust's view of expert testimony. I'm not a</p>

<p style="text-align: right;">Page 86</p> <p>1 valuation expert.</p> <p>2 Q. To this date has the Trust</p> <p>3 determined what the loss in enterprise value is</p> <p>4 from the company allegedly resulting from the</p> <p>5 tender offer and the sale process?</p> <p>6 A. No.</p> <p>7 Q. Okay. Other than the five</p> <p>8 categories of damages that are listed in the</p> <p>9 first paragraph of the Trust's response,</p> <p>10 interrogatory number two, are there any other</p> <p>11 additional categories of damages that the trust</p> <p>12 has identified since it served these</p> <p>13 interrogatory responses through today?</p> <p>14 A. I think this is it. I think this</p> <p>15 pretty much covers it.</p> <p>16 Q. Okay.</p> <p>17 MR. SCHEIER: Take a short break.</p> <p>18 MS. ANDREW: Okay.</p> <p>19 THE VIDEOGRAPHER: We're off the</p> <p>20 record.</p> <p>21 (Pause in proceedings.)</p> <p>22 THE VIDEOGRAPHER: We're on the</p> <p>23 record.</p> <p>24 BY MR. SCHEIER:</p> <p>25 Q. Mr. Miller, could you put before</p>	<p style="text-align: right;">Page 88</p> <p>1 Q. Okay. And who did you discuss</p> <p>2 that with? Miss Andrew?</p> <p>3 A. Miss Andrew.</p> <p>4 Q. Okay. Secondly, can you identify</p> <p>5 any specific disclosure that was inaccurate in</p> <p>6 the tender offer materials?</p> <p>7 A. Well, we could go through the</p> <p>8 tender offer materials if we'd like to do that</p> <p>9 but --</p> <p>10 Q. Well, I'd like to know first of</p> <p>11 all, as a matter of fact, as you sit here</p> <p>12 today, can you identify for me any disclosure</p> <p>13 in the tender offer materials that was</p> <p>14 inaccurate?</p> <p>15 A. Yes.</p> <p>16 Q. Okay.</p> <p>17 A. I mean, in terms of the conflict</p> <p>18 of interest and in terms of the assertion --</p> <p>19 basically the impression given and also in that</p> <p>20 conflict of interest statement that Houlihan</p> <p>21 had essentially blessed the transaction or had</p> <p>22 determined that the transaction was fair to the</p> <p>23 company.</p> <p>24 There is a -- in that provision</p> <p>25 there is a section that deals with the</p>
<p style="text-align: right;">Page 87</p> <p>1 you again Exhibit 42, which is the amended</p> <p>2 complaint?</p> <p>3 A. Yeah. And before we go too far,</p> <p>4 it occurred to me on a break, in response to</p> <p>5 your earlier question about the factual basis</p> <p>6 in support of the equitable tolling, we talked</p> <p>7 about, you know, the individuals who knew,</p> <p>8 didn't speak up.</p> <p>9 It also occurs to me that, you</p> <p>10 know, one of the other issues the Trust has</p> <p>11 made and I think is -- is that the disclosure</p> <p>12 that was given was not accurate and/or</p> <p>13 adequate -- you know, that there were issues</p> <p>14 with the tender offer document, shall I say, in</p> <p>15 terms of the adequacy of the disclosure and</p> <p>16 that there were inaccuracies in that document</p> <p>17 in the Trust's view to the extent that that</p> <p>18 bears on the issue with respect to -- so I</p> <p>19 don't want to foreclose. I wanted to make</p> <p>20 certain that that got into the mix.</p> <p>21 Q. Two follow-up questions. Did you</p> <p>22 discuss that issue with your counsel during the</p> <p>23 break just now and they reminded you of that</p> <p>24 point?</p> <p>25 A. Yes, they did.</p>	<p style="text-align: right;">Page 89</p> <p>1 conflicts of interest and cites the Ohio law</p> <p>2 with respect to conflicted director</p> <p>3 transactions and gives three tests. And in the</p> <p>4 view of the Trust, none of those tests were</p> <p>5 met.</p> <p>6 The other failures to disclose</p> <p>7 with respect to that document is that there's</p> <p>8 no mention in there that the transaction is</p> <p>9 avoidable as a fraudulent conveyance under Ohio</p> <p>10 law. What are the consequences of that so that</p> <p>11 people obtaining this information would</p> <p>12 potentially know that they might have to pay</p> <p>13 the money back. Those are two off the top of</p> <p>14 my head.</p> <p>15 Q. I need more than off the top of</p> <p>16 your head. I need to know, in fact, what</p> <p>17 was -- what was -- what was not disclosed in</p> <p>18 that document or what was improperly -- or</p> <p>19 disclosed inaccurately in the document?</p> <p>20 MS. ANDREW: Well, it's not a test of</p> <p>21 his memory so let him look at the document.</p> <p>22 MR. SCHEIER: Let's go off the</p> <p>23 record.</p> <p>24 THE VIDEOGRAPHER: We're off the</p> <p>25 record.</p>



<p style="text-align: right;">Page 90</p> <p>1 (Pause in proceedings.)  2 THE VIDEOGRAPHER: We're on the  3 record.  4 BY MR. SCHEIER:  5 Q. Mr. Miller, we were giving you the  6 opportunity to look through the tender offer  7 document. For the record it's been previously  8 marked in this case as Exhibit 560.  9 A. Okay.  10 Q. You initially mentioned that there  11 was either a nondisclosure or an inaccurate  12 disclosure in the conflicts of interest  13 section; is that right?  14 A. That, and there are other issues  15 as well.  16 Q. Okay. Let's go -- we're going to  17 need to cover those issues so I understand what  18 issues you have with the plan. With regard to  19 the conflicts of interest section --  20 A. I prefer to start at the beginning  21 of the document and work our way through.  22 Q. That might be your preference but  23 I want to first start with the conflicts of  24 interest section which is on page eighty-three  25 of the document. I believe that the Bates</p>	<p style="text-align: right;">Page 92</p> <p>1 MR. SCHEIER: Is that right, Marcia?  2 MS. ANDREW: That's correct.  3 MR. SCHEIER: Great.  4 BY MR. SCHEIER:  5 Q. So if you turn your attention to  6 internal page eighty-three.  7 A. Uh-huh.  8 Q. And if you can show me there  9 anything that's inaccurately disclosed or that  10 was not disclosed.  11 A. My recollection of this is that  12 the list appeared, at least as it pertains to  13 the Morgans, may well not contain the full  14 number of shares that they transferred and the  15 total consideration received because that seems  16 a little -- the number seems light to me.  17 There is a tally sheet that was  18 done right after the transaction or right  19 before the closing that lists out what  20 everybody got and how many shares they  21 exchanged and, you know, those two things  22 either match up with this or they don't.  23 Q. Okay.  24 A. But be that as it may, I think --  25 Q. Well, I need to know factually.</p>
<p style="text-align: right;">Page 91</p> <p>1 control number is MOR001295.  2 A. Okay. I'm working off of Exhibit  3 31, so we're clear, but we'll make it work.  4 Q. Do you have a -- okay. It's page  5 eighty-three internally of the document?  6 A. Yes.  7 MR. SCHEIER: I think probably  8 counsel should get him Exhibit 560.  9 MS. ANDREW: Well, we could do that  10 but the one that --  11 MR. SCHEIER: Well, I want to go off  12 the record. I'd like to go off the record,  13 please.  14 THE VIDEOGRAPHER: We're off the  15 record.  16 (Pause in proceedings.)  17 THE VIDEOGRAPHER: We're on the  18 record.  19 BY MR. SCHEIER:  20 Q. Okay. Your counsel has agreed  21 that although you're working off of Exhibit 31,  22 I'm working off of Exhibit 560, there will be  23 no objection on that basis because we're going  24 to be now using the internal document numbers  25 that should be the same in both exhibits.</p>	<p style="text-align: right;">Page 93</p> <p>1 Do you -- can you point to any document that  2 indicates that the disclosure of the amount of  3 shares listed as beneficially owned by Lee  4 Morgan in this document or beneficially owned  5 or controlled by Asha Moran in this document is  6 incorrect because it was carried over into your  7 interrogatory response into -- in terms of the  8 basis for the damages you are going to be  9 seeking?  10 A. Well, I would look to the tally  11 sheet in terms of the basis of the damages in  12 terms of how many dollars came out --  13 Q. Okay. So as you sit here today --  14 A. -- and where they went.  15 Q. As you sit here today, you don't  16 know whether or not the disclosure with regard  17 to Mr. Morgan or Miss Moran were inaccurate  18 here with regard to the amount of shares they  19 beneficially held as of the date that this  20 document, Exhibit 560 and Exhibit 31, were  21 published?  22 MS. ANDREW: Objection.  23 Mischaracterizes his testimony.  24 BY MR. SCHEIER:  25 Q. Well, do you have --</p>

<p style="text-align: right;">Page 94</p> <p>1 A. I'm telling you that I'd like to 2 compare those two things. 3 Q. Okay. Well then, we have -- 4 A. Let's do it. 5 Q. -- go off the record and do it. 6 A. Very good. 7 THE VIDEOGRAPHER: We're off the 8 record. 9 (Pause in proceedings.) 10 THE VIDEOGRAPHER: We're on the 11 record. 12 BY MR. SCHEIER: 13 Q. Okay. Mr. Miller, you pulled out 14 a document I think that's been marked 15 previously as Exhibit 294, which I don't have 16 the benefit of looking at but I'll ask -- 17 that's okay, you can look at it. What about 18 that document indicates to you that the 19 pretransaction disclosure on page eighty-three 20 with regard to conflicts of interest was in any 21 way inaccurate? 22 A. Well, it appears to me from this 23 document as if there are considerably more 24 shares listed in the name of Asha Morgan Moran, 25 particularly those held in what appear to be</p>	<p style="text-align: right;">Page 96</p> <p>1 and as trustee of certain trusts? 2 A. Yes. I mean, if we're talking 3 about making full disclosure -- 4 Q. Uh-huh. 5 A. -- in the Trust's view, that is 6 not full disclosure what is in the trust -- 7 what is in the document. 8 Q. If you look at page sixty-six of 9 your exhibit, and let me know if all or some of 10 the shares you just mentioned are disclosed on 11 that page in regard to additional shares that 12 were held by trusts where Miss Moran serves as 13 the trustee. 14 A. Let's see. 15 Q. You'll see it's a total of about 16 sixty thousand additional shares being 17 disclosed there in addition to the ninety-four 18 thousand shares she held primarily as a 19 trustee. 20 A. I'm sorry, are we looking at the 21 top of this page here with her name -- 22 Q. Yes, sir, you'll see the top of 23 page sixty-six -- 24 A. -- is that where we're talking. 25 Q. -- lists all of the shares -- all</p>
<p style="text-align: right;">Page 95</p> <p>1 five different trusts. That the total here on 2 Miss -- on Exhibit -- what I'm looking at is 3 page eighty-three of the tender offer document, 4 lists ninety-four thousand seven hundred and 5 twenty-one shares and in Exhibit 294 there's a 6 list -- there are six numbers listed with 7 respect to Miss Moran and her trust and those 8 amounts are as follows: Two million five -- 9 I'm sorry, two thousand five hundred and 10 eighty-six shares, eighty thousand six hundred 11 and eleven shares, twenty-three thousand eight 12 hundred and twenty-one shares, twenty-three 13 thousand eight hundred and twenty-two shares, 14 eleven thousand six hundred and eighty-one 15 shares, and twelve thousand one hundred and 16 sixty-eight shares. And so that -- I have not 17 done that total, done the math, but it appears 18 to me that that clearly exceeds the ninety-four 19 thousand seven hundred and twenty-one shares 20 listed on page eighty-three. 21 Q. And in your view, would that be 22 material for someone to know that Miss Moran 23 was going to be able to take out at a minimum 24 eighty million dollars, but possibly more, in 25 terms of the shares she held both personally</p>	<p style="text-align: right;">Page 97</p> <p>1 of the outside -- strike that. 2 The top of page sixty-six lists 3 all of the shares in The Antioch Company held 4 outside of the ESOP as of the date that this 5 was published as well as the shares held within 6 the ESOP. It purports to disclose all shares 7 held in The Antioch Company. Do you see that? 8 A. Yes, I do. 9 Q. Okay. You were just stating that 10 the disclosure on page eighty-three omitted to 11 disclose some number of shares that Miss Moran 12 held as trustee, and I'm asking you if the 13 disclosure -- the lack of disclosure that you 14 were referencing is actually made on page 15 sixty-six of the Exhibit 31 that you have and 16 Exhibit 560 that I had? 17 A. I would tell you I've not done the 18 math, but the numbers on page sixty-six still 19 look light to me in comparison to here, so why 20 don't you let me just do the math real quick. 21 Q. Sure. 22 A. We can go off the record and save 23 you time. 24 Q. Sure. 25 THE VIDEOGRAPHER: We're off the</p>

<p style="text-align: right;">Page 98</p> <p>1 record.</p> <p>2 (Pause in proceedings.)</p> <p>3 THE VIDEOGRAPHER: We're on the</p> <p>4 record.</p> <p>5 BY MR. SCHEIER:</p> <p>6 Q. Okay, Mr. Miller, were you able to</p> <p>7 do the calculation?</p> <p>8 A. I was. They do appear to be very</p> <p>9 close.</p> <p>10 Q. Sufficient enough for it to be</p> <p>11 full disclosure in your mind?</p> <p>12 A. No, because --</p> <p>13 Q. Then what's the difference between</p> <p>14 what's disclosed and the amounts shown on</p> <p>15 Exhibit 294, assuming that exhibit is accurate?</p> <p>16 A. Because these numbers don't show</p> <p>17 up under the conflict of interest section.</p> <p>18 Q. Oh, I'm sorry. I'm sorry. Let's</p> <p>19 take a step back. I'm talking about now on</p> <p>20 page sixty-six --</p> <p>21 A. On sixty-six?</p> <p>22 Q. Yes -- to ask you whether --</p> <p>23 A. It appears that this matches up,</p> <p>24 the following two -- it's a discussion of the</p> <p>25 share ownership and the stock split and that's</p>	<p style="text-align: right;">Page 100</p> <p>1 A. Yes. And as I mentioned earlier,</p> <p>2 the following -- on that page following the</p> <p>3 disclosure of the shares there's a discussion</p> <p>4 of the Ohio general corporation law, and the</p> <p>5 last item of which is that the contract,</p> <p>6 action, or transaction is fair to the</p> <p>7 corporation at the time that it's authorized or</p> <p>8 approved by the directors, and it then proceeds</p> <p>9 to discuss the Houlihan opinion with respect to</p> <p>10 the fairness of the consideration offered in</p> <p>11 the transaction, the board has approved the</p> <p>12 transaction, determined that it's fair in</p> <p>13 reliance on the Houlihan opinion, but that was</p> <p>14 clearly not the purpose for which the Houlihan</p> <p>15 opinion was obtained --</p> <p>16 Q. Let me --</p> <p>17 A. -- by the terms of that opinion.</p> <p>18 Q. Was the opinion, to the best of</p> <p>19 your understanding, attached as Appendix D to</p> <p>20 the disclosure document that is Exhibit 560 and</p> <p>21 31?</p> <p>22 A. Yes, I believe that it was.</p> <p>23 Q. Okay. Thank you. Anything else</p> <p>24 under the conflicts of interest section that</p> <p>25 is, to your mind, an inaccurate disclosure?</p>
<p style="text-align: right;">Page 99</p> <p>1 a listing of everything that appears to be in</p> <p>2 there, and that listing appears to match up --</p> <p>3 let me be more precise.</p> <p>4 Q. Well, let me ask a different</p> <p>5 question.</p> <p>6 A. Okay.</p> <p>7 Q. Do the number of shares that are</p> <p>8 shown as being beneficially held by Asha Morgan</p> <p>9 Moran either individually or as a trustee</p> <p>10 match -- on page sixty-six of the disclosure</p> <p>11 document match with the number of shares that</p> <p>12 Miss Moran beneficially owned either</p> <p>13 individually or as trustee that were exchanged</p> <p>14 in the tender offer that appear on Exhibit 294?</p> <p>15 A. The amounts are very close, yes.</p> <p>16 Q. Okay. Are they materially</p> <p>17 different?</p> <p>18 A. No.</p> <p>19 Q. Okay. Thank you. Other than the</p> <p>20 number of shares that -- other than the issue</p> <p>21 with regard to the number of shares that are</p> <p>22 identified on page eighty-three of Exhibit 31</p> <p>23 and Exhibit 560, is there any other disclosure</p> <p>24 under the conflicts of interest section on page</p> <p>25 eighty-three that you take issue with?</p>	<p style="text-align: right;">Page 101</p> <p>1 A. I think that that's -- those items</p> <p>2 are the ones that the Trust has identified.</p> <p>3 Q. Okay. Are there any other</p> <p>4 inaccurate disclosures that the Trust believes</p> <p>5 exists in Exhibit 31 and 560?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. Can you point those out,</p> <p>8 please?</p> <p>9 A. Sorry. I'm moving as fast as I</p> <p>10 can.</p> <p>11 There's a discussion on page five</p> <p>12 of that document in terms of what are the goals</p> <p>13 of the transaction, and that discussion occurs</p> <p>14 in other places as well.</p> <p>15 Q. Is the --</p> <p>16 A. Page twenty, for example, is</p> <p>17 another place.</p> <p>18 Q. Well, let's go back.</p> <p>19 A. Sure.</p> <p>20 Q. I understand you want to go</p> <p>21 through it quickly, but I need to get into a</p> <p>22 little bit more detail with you.</p> <p>23 A. Okay.</p> <p>24 Q. Are you referring -- with regard</p> <p>25 to what are the goals of the transaction, that</p>

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<p>1 question and then the answer on page five?</p> <p>2 A. Yes, the very first bullet point</p> <p>3 that says the transaction is designed to</p> <p>4 address an issue related to the ESOP's benefit</p> <p>5 allocation structure.</p> <p>6 Q. Okay. You believe that to be</p> <p>7 inaccurate?</p> <p>8 A. Yes, in terms of what actually</p> <p>9 occurred as a result of the transaction.</p> <p>10 Q. Well -- but I'm asking as -- did</p> <p>11 you believe that was an inaccurate disclosure</p> <p>12 of what the board considered to be a goal of</p> <p>13 the transaction, that being to address an issue</p> <p>14 related to the ESOP's benefit allocation</p> <p>15 structure?</p> <p>16 A. Yes, because this doesn't address</p> <p>17 that goal. So the representation is that this</p> <p>18 is a goal of the transaction that the</p> <p>19 transaction is going to address, it says, and,</p> <p>20 in fact, it doesn't. The benefit allocation</p> <p>21 issue continues post the transaction. In fact,</p> <p>22 the company in the equity holder agreement</p> <p>23 agrees that those future dividends will be</p> <p>24 portioned by account, which was the issue with</p> <p>25 the S corporation distributions that the board</p>	<p>1 impact of this on the company long term.</p> <p>2 And frankly, even to some extent</p> <p>3 ignoring the short-term impacts on the company</p> <p>4 in terms of what they showed as the negative</p> <p>5 cash flow as well as, you know, just -- it's</p> <p>6 interesting to me that the language used here</p> <p>7 and throughout is the long-term survivability</p> <p>8 of the company because the transaction in and</p> <p>9 of itself is predicated on benefits -- tax</p> <p>10 benefits accruing over a period of time and all</p> <p>11 of the projections seem to show that the</p> <p>12 positives of that really don't kick in until</p> <p>13 2007 or later.</p> <p>14 Q. In preparing for this deposition,</p> <p>15 did you have a look at Deloitte &amp; Touche's</p> <p>16 feasibility report that was prepared and</p> <p>17 presented to the board in July of 2003?</p> <p>18 A. I'm sure, yes.</p> <p>19 Q. You did? Do you believe that</p> <p>20 Deloitte &amp; Touche was at the time competent to</p> <p>21 prepare such a feasibility analysis based on</p> <p>22 your understanding of that entity?</p> <p>23 A. I presume that they were, yes.</p> <p>24 Q. Do you believe that the board of</p> <p>25 directors were entitled to rely upon the advice</p>
Page 103	Page 105
<p>1 originally thought they might address by this</p> <p>2 transaction.</p> <p>3 Q. Anything else about the answer to</p> <p>4 what are the goals of the transaction that you</p> <p>5 believe to be inaccurate?</p> <p>6 A. Again, from the Trust perspective,</p> <p>7 the statement in the second bullet point that</p> <p>8 the company has structured this transaction in</p> <p>9 a manner to offer this liquidity to</p> <p>10 shareholders without impairing the long-term</p> <p>11 survivability of the company, we think that</p> <p>12 that is inaccurate inasmuch as the transaction</p> <p>13 rendered the company balance sheet insolvent in</p> <p>14 a big way.</p> <p>15 Q. Do you believe that any of the</p> <p>16 directors intended to impair the long-term</p> <p>17 survivability of the company at the time they</p> <p>18 published this document?</p> <p>19 A. Did they intend to -- I believe</p> <p>20 that that was some -- that they did not dig in</p> <p>21 hard enough on those issues, I think, is our --</p> <p>22 is the Trust's position. That they did not --</p> <p>23 they breached their fiduciary duties by not</p> <p>24 digging into the question in prior board</p> <p>25 meetings and otherwise of what is really the</p>	<p>1 and opinions of their financial advisor</p> <p>2 Deloitte &amp; Touche that, in fact, the</p> <p>3 transaction as structured by Deloitte &amp; Touche</p> <p>4 was not going to impair the long-term</p> <p>5 survivability of the company?</p> <p>6 A. No. Deloitte &amp; Touche was brought</p> <p>7 into this by the Morgan family, from what the</p> <p>8 documents indicate to us. That Deloitte &amp;</p> <p>9 Touche was doing estate planning for the</p> <p>10 Morgans.</p> <p>11 There are a fair number of</p> <p>12 documents throughout whereas in the earlier</p> <p>13 portions of this transaction, that -- where</p> <p>14 it's clear that Deloitte is looking out for the</p> <p>15 Morgans in this in terms of what is the impact</p> <p>16 of this transaction on the Morgans. Deloitte</p> <p>17 did not undertake to issue any sort of opinions</p> <p>18 in connection with this.</p> <p>19 And if we're talking about the</p> <p>20 same July presentation that I think we are, I</p> <p>21 believe that that initial presentation by</p> <p>22 Deloitte involved a six hundred and eighty</p> <p>23 dollar per share share price and involved</p> <p>24 seller notes and no outside bank indebtedness.</p> <p>25 So it was an entirely different transaction</p>

<p style="text-align: right;">Page 106</p> <p>1 than what ultimately occurred.</p> <p>2 Q. And did you review Deloitte's</p> <p>3 subsequent remodeling of the transaction as the</p> <p>4 negotiations were proceeding and its</p> <p>5 determination that the transaction would not</p> <p>6 negatively impact the company's long-term</p> <p>7 survivability?</p> <p>8 MS. ANDREW: Objection to the form.</p> <p>9 THE WITNESS: I don't recall seeing</p> <p>10 any opinion from Deloitte to that effect.</p> <p>11 BY MR. SCHEIER:</p> <p>12 Q. Do you recall studying their</p> <p>13 spreadsheets to look at the numbers to</p> <p>14 determine what --</p> <p>15 A. I did look at them --</p> <p>16 Q. -- to determine whether --</p> <p>17 A. I'm sorry.</p> <p>18 Q. -- the numbers that Deloitte was</p> <p>19 presenting to the board indicated the long term</p> <p>20 survivability of the company?</p> <p>21 A. The numbers indicated that there</p> <p>22 were significant, you know, negative cash</p> <p>23 position in the first four years, in my</p> <p>24 recollection, and stepping up. And, again, the</p> <p>25 numbers were predicated upon sales projections</p>	<p style="text-align: right;">Page 108</p> <p>1 which is more significant.</p> <p>2 And, in fact, we see in '05, '06</p> <p>3 time frame when Richard Wiser comes in to start</p> <p>4 modeling things, that, wow, you know, that</p> <p>5 declining productivity is indicative of the</p> <p>6 company experiencing and the start of a long</p> <p>7 downturn downturn.</p> <p>8 So it's not clear to me from the</p> <p>9 documents that Deloitte had all of that</p> <p>10 information. It's not clear from the board</p> <p>11 minute -- meeting minutes necessarily, although</p> <p>12 I presume -- well, I shouldn't presume. That</p> <p>13 information was clearly out there and</p> <p>14 circulating. I don't necessarily see it</p> <p>15 reflected in all the projections --</p> <p>16 Q. So you don't know --</p> <p>17 A. -- but --</p> <p>18 Q. Go ahead. I'm sorry.</p> <p>19 A. Again, I'm not a financial expert</p> <p>20 but just based on my review of that, I don't</p> <p>21 see that.</p> <p>22 MR. SCHEIER: We just need to take a</p> <p>23 short break for the videographer to change the</p> <p>24 tape.</p> <p>25 THE VIDEOGRAPHER: We're off the</p>
<p style="text-align: right;">Page 107</p> <p>1 for the company. And I believe the Deloitte</p> <p>2 people were real clear that they just took the</p> <p>3 numbers from the company and plugged them into</p> <p>4 their model.</p> <p>5 And so, you know, yes, there were</p> <p>6 spreadsheets out there that Deloitte prepared;</p> <p>7 but, again, I think it's up to the board and</p> <p>8 the board members to question those numbers</p> <p>9 knowing Deloitte's dual role in the</p> <p>10 transaction, involved on behalf of the Morgans</p> <p>11 as well as apparently running numbers for the</p> <p>12 company. And its incumbent upon the board</p> <p>13 members in that instance to really drill down.</p> <p>14 And I think, you know, in looking</p> <p>15 through some of those things, the other issue</p> <p>16 in the unknown here -- a couple things -- is</p> <p>17 the repurchase obligation and the extent to</p> <p>18 which Deloitte, or frankly anyone, dug very</p> <p>19 hard into those numbers.</p> <p>20 And also the company's financial</p> <p>21 situation. There are references in board</p> <p>22 minute -- board meeting minutes in early '03</p> <p>23 and onward with respect to declining sales, and</p> <p>24 there are references in Mr. Morgan's monthly</p> <p>25 reports in 2003 to declining productivity,</p>	<p style="text-align: right;">Page 109</p> <p>1 record.</p> <p>2 (Pause in proceedings.)</p> <p>3 THE VIDEOGRAPHER: We're on the</p> <p>4 record.</p> <p>5 BY MR. SCHEIER:</p> <p>6 Q. A couple of follow-up questions.</p> <p>7 A. Okay.</p> <p>8 Q. Do you know of any facts</p> <p>9 indicating that Deloitte didn't properly</p> <p>10 execute its duties to the board of directors as</p> <p>11 the board of directors' financial advisor</p> <p>12 because they had done some estate planning work</p> <p>13 for the Morgans?</p> <p>14 A. My understanding is that Deloitte</p> <p>15 was engaged to do some initial feasibility</p> <p>16 studies with respect to an ESOP.</p> <p>17 Q. Uh-huh.</p> <p>18 A. They do not appear in any of the</p> <p>19 disclosures here as the financial advisor to</p> <p>20 the board or as the ones who were doing the --</p> <p>21 a fairness analysis for the company, was this</p> <p>22 fair to the company, and there was certainly no</p> <p>23 opinion ever issued by Deloitte.</p> <p>24 Q. Sir, I understand you kind of want</p> <p>25 to make statements on the record and I respect</p>



<p style="text-align: right;">Page 110</p> <p>1 that, but my question was relatively simple.</p> <p>2 Do you know of any facts indicating that</p> <p>3 Deloitte didn't loyally execute its duties to</p> <p>4 the board of directors as a result of work it</p> <p>5 had done previously for the Morgans in regard</p> <p>6 to estate planning?</p> <p>7 A. No.</p> <p>8 Q. Okay. With regard to sales in</p> <p>9 2003, did you review any documents indicating</p> <p>10 that, in fact, sales in 2003 increased over the</p> <p>11 level of sales that the company had recognized</p> <p>12 and achieved in 2002 but simply had not met</p> <p>13 plan?</p> <p>14 A. That is correct.</p> <p>15 Q. Okay. I thought you mentioned</p> <p>16 something about sales declining between 2002</p> <p>17 and 2003, but that's not what you were saying,</p> <p>18 correct?</p> <p>19 A. Productivity declined.</p> <p>20 Q. We can get to productivity in a</p> <p>21 moment.</p> <p>22 A. If I misstated that --</p> <p>23 Q. I think you did.</p> <p>24 A. Okay. I apologize.</p> <p>25 Q. So you're not testifying that the</p>	<p style="text-align: right;">Page 112</p> <p>1 about this issue refresh your recollection that</p> <p>2 you reviewed Mr. Wiser's deposition?</p> <p>3 A. I probably reviewed portions of</p> <p>4 it, you know, with respect to certain exhibits,</p> <p>5 I think.</p> <p>6 Q. Did you review the portion of</p> <p>7 Mr. Wiser's testimony that productivity is only</p> <p>8 one of many --</p> <p>9 A. Oh, yes.</p> <p>10 Q. -- indicators that would show</p> <p>11 future financial performance?</p> <p>12 A. Yes, I did, although I thought</p> <p>13 there was also something in his deposition, and</p> <p>14 I may have it confused with another, that it is</p> <p>15 somewhat of a leading indicator that when it --</p> <p>16 when productivity is going down and</p> <p>17 consistently going down, that that may well --</p> <p>18 again, so we're clear, the folks out in the</p> <p>19 field, the revenue generation for this company</p> <p>20 is the consultants; and if they're ordering</p> <p>21 less on average on a consistent basis over</p> <p>22 time, sales are going to go down.</p> <p>23 And there was also some indication</p> <p>24 of that being a product issue, that they --</p> <p>25 that the products aren't such that they</p>
<p style="text-align: right;">Page 111</p> <p>1 board of directors was in a situation where</p> <p>2 sales had declined between 2002 and 2003,</p> <p>3 correct?</p> <p>4 A. They were not meeting plan.</p> <p>5 Q. But sales increased in 2003 over</p> <p>6 the sales levels in 2002, correct?</p> <p>7 A. Correct.</p> <p>8 Q. Okay. In terms of productivity,</p> <p>9 do you have -- or do you know of any facts</p> <p>10 indicating that the board of directors did not</p> <p>11 take into account declining productivity among</p> <p>12 its sales force or the consultants, rather, out</p> <p>13 in the field?</p> <p>14 A. I don't see any reference to the</p> <p>15 declining productivity in the board meeting</p> <p>16 minutes or in presentations --</p> <p>17 Q. Okay. Did you look in --</p> <p>18 A. -- but -- I'm sorry.</p> <p>19 Q. Go ahead.</p> <p>20 A. -- but that's not to say that that</p> <p>21 wasn't -- those facts were not in the mix.</p> <p>22 Q. Okay. Very good. Thank you.</p> <p>23 Earlier you had gone through some depositions</p> <p>24 that you reviewed. You didn't mention</p> <p>25 Mr. Wiser's deposition. Did this -- talking</p>	<p style="text-align: right;">Page 113</p> <p>1 would -- the salespeople are buying as many of</p> <p>2 them.</p> <p>3 Q. Bottom line is --</p> <p>4 A. That's my recollection.</p> <p>5 Q. -- you don't know one way or the</p> <p>6 other whether the board in 2003 had the data</p> <p>7 before them and considered productivity of the</p> <p>8 field consultants?</p> <p>9 A. Since the decline in productivity</p> <p>10 was mentioned in Mr. Morgan's monthly reports,</p> <p>11 I would have thought the board would have that</p> <p>12 information since --</p> <p>13 Q. Okay. Yeah, I think they did have</p> <p>14 the information so that indication is correct.</p> <p>15 Anything else about the disclosure</p> <p>16 materials that you feel is inaccurate other</p> <p>17 than what we discussed in regard to shares</p> <p>18 being tendered to the company by the outside</p> <p>19 shareholders and what you identified in regard</p> <p>20 to the response to a Q and A portion on page</p> <p>21 five about the goals of the transaction.</p> <p>22 A. Well, we talked about the goals of</p> <p>23 the transaction, again, over on pages eighteen</p> <p>24 and nineteen.</p> <p>25 Q. Okay. Don't need to -- I</p>

<p style="text-align: right;">Page 114</p> <p>1 understand your position there.</p> <p>2 Anything else that's contained in</p> <p>3 this document that the trust considers to be an</p> <p>4 inaccurate disclosure?</p> <p>5 A. And I will throw into the</p> <p>6 inaccurate list and complete, again, page</p> <p>7 twenty-four Houlihan talks about how they</p> <p>8 approached the eight fifty per share number,</p> <p>9 and they're talking in terms of enterprise</p> <p>10 value and subtracting out the company's debt of</p> <p>11 twenty-one point one million to arrive at a</p> <p>12 range of value of the share of eight fifty or I</p> <p>13 guess to eight twenty-five to nine twenty a</p> <p>14 share.</p> <p>15 And if you look at the pro forma</p> <p>16 balance sheets over here on pages fifteen and</p> <p>17 what have you and you see the amount of debt</p> <p>18 that the company takes on, it's just -- it's</p> <p>19 interesting to me and to the Trust that there</p> <p>20 isn't that disclosure of you're looking at</p> <p>21 enterprise value but it's enterprise value that</p> <p>22 appears to be not taking into account the</p> <p>23 effects of the transaction on the enterprise.</p> <p>24 Q. Okay. Fair enough. Do you -- did</p> <p>25 you come into knowledge in preparing for this</p>	<p style="text-align: right;">Page 116</p> <p>1 31st, 2003?</p> <p>2 A. Aside from what may be in that</p> <p>3 e-mail and I guess comparing that to what the</p> <p>4 Duff &amp; Phelps folks expected, which was a</p> <p>5 decline in the value post the transaction,</p> <p>6 which apparently didn't occur, and the surprise</p> <p>7 that I believe Mr. Morgan indicates in his</p> <p>8 monthly reports as to where the valuations came</p> <p>9 in, no.</p> <p>10 Q. Okay.</p> <p>11 MR. SCHEIER: Can I see the question?</p> <p>12 Okay.</p> <p>13 BY MR. SCHEIER:</p> <p>14 Q. Anything else in the disclosure</p> <p>15 statements, Exhibit 560 or Exhibit 31, that you</p> <p>16 believe inaccurately discloses anything about</p> <p>17 the transaction to the recipients of the</p> <p>18 document?</p> <p>19 A. I'll keep looking. Oh, page</p> <p>20 thirty, conditions to the tender offer. This</p> <p>21 lists out five conditions, one of which is the</p> <p>22 execution and delivery of the equity holder's</p> <p>23 agreement. And if you go two paragraphs down,</p> <p>24 it says except for the condition in four above,</p> <p>25 the conditions to the closing of the tender</p>
<p style="text-align: right;">Page 115</p> <p>1 deposition that after the transaction closed, a</p> <p>2 valuation firm that was engaged at the behest</p> <p>3 of the independent trustee during the</p> <p>4 transaction to value the company had taken into</p> <p>5 account the debt that it took on in the</p> <p>6 transaction?</p> <p>7 A. Yes, I understand that there was</p> <p>8 an ESOP share valuation done.</p> <p>9 Q. And do you understand that that</p> <p>10 valuation valued the shares as of December</p> <p>11 31st, 2003, about two weeks after the</p> <p>12 transaction, at eight hundred and ninety-four</p> <p>13 dollars per share?</p> <p>14 A. Yeah, I believe that was correct.</p> <p>15 Uh-huh.</p> <p>16 Q. Okay.</p> <p>17 A. And there are also e-mails</p> <p>18 subsequently in the sale transaction phase</p> <p>19 where I recall it was -- we'll have to find it,</p> <p>20 but somebody is wondering why Barry Hoskins as</p> <p>21 the CFO wasn't pushing back to the valuation</p> <p>22 firm in terms of that valuation but --</p> <p>23 Q. Oh. Do you have any facts</p> <p>24 indicating that the valuation firm did anything</p> <p>25 wrong in valuing the shares as of December</p>	<p style="text-align: right;">Page 117</p> <p>1 offer are for the sole benefit of the company</p> <p>2 and may be asserted by the company at its sole</p> <p>3 discretion regardless of the circumstances</p> <p>4 giving rise to any such condition or may be</p> <p>5 waived by the company in sole discretion in</p> <p>6 whole or in part. That statement is not</p> <p>7 accurate.</p> <p>8 The equity holder's agreement</p> <p>9 reflects an agreement between the company and</p> <p>10 the ESOP trustee with respect to the valuation</p> <p>11 of the shares. And, really, the document</p> <p>12 itself doesn't really explain the genesis of</p> <p>13 that, which I think is material to people. And</p> <p>14 it's material in the sense that in the</p> <p>15 September '07 time frame, Duff &amp; Phelps pushes</p> <p>16 back and says, hey, eight fifty, and</p> <p>17 particularly with respect to the warrant, is</p> <p>18 too -- too expensive. The number needs to be</p> <p>19 less. There's more value here in the warrant</p> <p>20 than what you are attributing, Houlihan, and</p> <p>21 that number needs to be less.</p> <p>22 And there was a significant amount</p> <p>23 of back-and-forth over a period of about a</p> <p>24 month with respect to that, and what resulted</p> <p>25 was the agreement that's reflected in the</p>

<p style="text-align: right;">Page 118</p> <p>1 equity holder's agreement. And that agreement  2 is the basis upon which Duff &amp; Phelps was able  3 to issue its fairness opinion and the ESOP  4 trustee was then able to agree to not tender  5 the ESOP shares in connection with this  6 transaction.  7 None of that, unless I've missed  8 it, is disclosed in here. And, in fact, when  9 we get to a discussion of the equity holder's  10 agreement, the impression -- or at least the  11 reader is left with the impression that the  12 company -- this is all up to the company and  13 the company can do this and that no one else --  14 that the ESOP trustee would not have an issue  15 if the company didn't enter into and deliver  16 that equity holder's agreement.  17 Q. Anything other than that?  18 A. Let's keep looking. Page  19 forty-four is kind of the flip side of the  20 earlier issue about what the -- the goal of the  21 transaction. And, again, this is another  22 consequence of the equity holder's agreement.  23 Q. Can you point to the section,  24 please, you're referring to?  25 A. I'm sorry.</p>	<p style="text-align: right;">Page 120</p> <p>1 Q. And you understood that the  2 contributions post-transaction were going to be  3 made on a compensation-based -- a  4 compensation-based allocation?  5 A. That's not clear from this  6 document, I don't think, as I read it.  7 But, in any event, there was only  8 one of those that was required by the equity  9 holder's agreement and that was in 2004 at  10 twenty-one percent. Beyond that the company  11 had no obligation to make any of those sorts of  12 contributions and were not undertaking to do  13 so, it appears.  14 Q. And do you know what the amount of  15 the dividends were that the -- the obligatory  16 dividends that the company was going to have to  17 pay into the ESOP as negotiated by GreatBanc?  18 A. Eight million in year one and two  19 point five million in year, what, four, five,  20 six, seven, and eight, I believe.  21 Q. Okay.  22 A. If I recall that correctly.  23 Q. Go ahead.  24 A. The repurchase obligations, page  25 seventy at the top.</p>
<p style="text-align: right;">Page 119</p> <p>1 Q. You just said page forty-four so  2 I --  3 A. The very end section, amendment to  4 the ESOP. On October 30th the ESOP was amended  5 to make certain changes. The ESOP now provides  6 that effective January 1, 2004 all dividends  7 received by the ESOP will be allocated among  8 participants' accounts on a per share basis.  9 And we've heard two or three times  10 earlier in the document that we've done the  11 transaction to avoid having to do this, but on  12 page -- forty-four pages in, at one place,  13 three or four -- we've got two or three other  14 places where it's the other way, we're  15 disclosing that, gee, we're not -- that's not  16 how we're going to do it.  17 Q. Well, that's just the -- that was  18 just for the dividend portion --  19 A. Correct.  20 Q. -- that GreatBanc had negotiated,  21 correct?  22 A. Correct.  23 Q. Okay. Got it.  24 A. But, yes, the deal was that all of  25 those would be on a per share basis.</p>	<p style="text-align: right;">Page 121</p> <p>1 Q. Yes, sir.  2 A. There's no numbers put on this.  3 The company will experience significant  4 repurchase obligations. Yeah, on this one it  5 strikes me that in terms of disclosure, that  6 there ought to be something in there with  7 respect to what the anticipated repurchase  8 obligations are and what the impact would be.  9 It's also -- the same issue over  10 on page seventy-one, conflict of interest,  11 retention of management, a consideration or a  12 concern that key managers may decide to leave  13 but no consideration with respect to employees  14 that might leave. There's information, I  15 think, in one or more of the slides or  16 presentations that there may be forty or more  17 people who have more than a million dollars in  18 their account. And there's no indication that  19 these folks that are, you know, at that stage  20 as a result of this transaction might decide to  21 leave, particularly when they see management  22 and others taking dollars out of the company.  23 It -- that piece is -- you know, there's no  24 indication or disclosure of that or the number  25 of people that have those million dollar</p>

<p style="text-align: right;">Page 122</p> <p>1 accounts or half million dollar accounts or 2 what that potential impact might be. 3 Q. Do you know of any facts 4 indicating that any of those people's decision 5 to leave, those people being folks who had 6 large account balances, was motivated by the 7 fact the outside tendering shareholders 8 received cash for their shares outside the 9 ESOP? 10 A. No, not as I sit here today. 11 Q. Okay. 12 A. But it seems to me to be a very 13 logical conclusion that one could draw from the 14 circumstances. 15 Q. You're just guessing? You don't 16 know what motivates people, anyone in 17 particular at Antioch, to stay or leave; is 18 that right? 19 A. In any particular individual, no. 20 Q. Yes. And nor was that within the 21 ability of management to determine whether any 22 individual person would stay or leave with the 23 company, do you? 24 A. Well, it strikes me that that 25 might have been an exercise worth undertaking.</p>	<p style="text-align: right;">Page 124</p> <p>1 MS. ANDREW: I'm sorry, what was the 2 time period? 3 MR. SCHEIER: 2003 to the end of 4 2007. 5 THE WITNESS: The -- as best we can 6 tell and the facts indicate that it does not 7 appear that those ESOP notes were ever adequately 8 secured. 9 BY MR. SCHEIER: 10 Q. Other than the adequate security 11 issue, did the company -- do you know of any 12 facts indicating that the company did not make 13 payments to any of its terminating employees 14 between the years 2003 and the end of 2007 15 based on their ESOP accounts and the value of 16 those accounts? 17 A. It's my understanding that all 18 those payments were made up until that point in 19 time. 20 Q. And do you know of any facts 21 indicating that The Antioch Company at any time 22 between 2003 and the end of 2007 failed to make 23 a timely payment to its secured lenders? 24 A. I'm not aware of them not making 25 payments timely to the secured lenders. Could</p>
<p style="text-align: right;">Page 123</p> <p>1 Q. Do you understand that the company 2 made a conscious decision not to because their 3 experience shows that employees typically do 4 not want to disclose to management whether or 5 not they're going to be leaving the company and 6 that's not an accurate indicator of actually 7 what an employee's thinking is? 8 A. Why not go get employment 9 agreements with people? 10 Q. Is that your position, that that's 11 what the board should have done? 12 A. It's a suggestion, but I think in 13 terms of -- it doesn't appear that there was a 14 lot of effort spent with respect to the 15 potential repurchase obligation. It's 16 mentioned various places; but in looking at 17 this transaction, it looks to be like a huge 18 miss in terms of the dollars that subsequently 19 go out for that, particularly when -- you know, 20 again -- well -- 21 Q. Well, let me ask you this: Do you 22 know of any facts indicating that at any time 23 between 2003 and the end of 2007 the company 24 defaulted on any obligation it had to any of 25 its terminating employees?</p>	<p style="text-align: right;">Page 125</p> <p>1 we take a lunch break? Would this be a good 2 time to break for lunch? 3 Q. Here at your convenience. 4 MS. ANDREW: Sure. Let's go off the 5 record. 6 THE VIDEOGRAPHER: We're off the 7 record. 8 (Pause in proceedings.) 9 THE VIDEOGRAPHER: We're on the 10 record. 11 BY MR. SCHEIER: 12 Q. Mr. Miller, other than the 13 provisions you've pointed out so far that 14 contain what you deem to be an inaccurate 15 disclosure, are there any others in Exhibit 16 560, which is the same as Exhibit 31, that you 17 deem to be inaccurate? 18 A. Well, in the -- pardon me -- in 19 the area of inaccuracy, I mean, I think there's 20 also the question of omissions; and I think 21 it's a worthwhile exercise to compare what's in 22 this and -- 23 Q. Let's take omissions in a moment. 24 We can get back to that. I'm asking you right 25 now, other than what you've testified to as</p>

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<p>1 being inaccurate statements in Exhibit 31, 2 Exhibit 560, are there any others in addition 3 to what you've testified to? 4 A. Inaccuracies? As I sit here 5 presently, none is occurring to me. I was more 6 focused on the omission side of things in terms 7 of what isn't disclosed. 8 Q. Well, let's get there in a moment. 9 What I need to know is whether or not there are 10 other disclosures in either of those exhibits, 11 560 or 31, that the Trust deems to be 12 inaccurate other than the ones you've already 13 testified to? 14 A. Again, I think that what I've 15 identified so far are the ones that stick out 16 to me as being inaccurate. 17 Q. All right. Now, you had mentioned 18 something about omissions. 19 A. Yes. 20 Q. What disclosures do you think were 21 legally required to be made that were not made 22 in Exhibit 560 and Exhibit 31? 23 A. Well -- 24 MS. ANDREW: I just object to the 25 extent you're asking for his legal opinion, but --</p>	<p>1 evaluation analysis because -- that -- with 2 respect to a present value analysis of the tax 3 savings over the ten years. When the deal was 4 presented to the board, it's presented in terms 5 of, gee, there's all this money that's going to 6 come from a tax savings -- pardon me -- now 7 that we are a one hundred percent ESOP, we 8 don't have to pay these dollars out in taxes or 9 in distributions to the ESOP, that money is 10 going to stay in the company. 11 And as I view the transaction, 12 that present value number, there's a reference 13 in a D&amp;T e-mail to it being sixty million 14 dollars. There's a reference, I think, in the 15 Duff &amp; Phelps materials to it maybe being in 16 the seventy-some million dollars, but the 17 company is incurring two hundred and forty-four 18 million dollars of obligation. Again, the 19 sources and uses are two hundred and forty-four 20 million. Now, part of that includes the 21 warrant values ascribed; but, you know, 22 basically well in excess of a present value of 23 sixty million dollars is going out of the 24 company in December. 25 Q. Can you identify the document</p>
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<p>1 and the question assumes that. 2 THE WITNESS: I think I mentioned 3 earlier in terms of the risk factors, there's no 4 mention with respect to the possibility that the 5 transaction could be unwound either as violating 6 Ohio corporate law or as violating Ohio fraudulent 7 conveyance law. Also -- 8 BY MR. SCHEIER: 9 Q. Strike that. Do you believe that 10 to be a material -- that would be a material 11 disclosure to the employee-owners and outside 12 shareholders being called upon to vote on the 13 transaction? 14 A. Yes. 15 Q. Okay. 16 A. Yes. 17 Q. Anything else? 18 A. In comparing -- in comparing this 19 to what the board is shown, I don't see 20 anything in here that discloses like the 21 aggregate value that's going out of the company 22 in exchange for the shares and what the company 23 is getting in return for that. 24 And there are references, I know, 25 in e-mails and possibly in the Duff &amp; Phelps</p>	<p>1 where you're deriving that present value from? 2 A. There is a -- an e-mail from Helen 3 Morrison, and this is in connection with the 4 back-and-forth with Duff &amp; Phelps. It has an 5 odd subject line to it. Deep thoughts. It's 6 the deep thoughts e-mail where she references 7 it being sixty million dollars. 8 In the Duff &amp; Phelps, I think we'd 9 have to look, it's their -- it's their initial 10 indication of value, I believe that initial 11 presentation that they give -- gave to the ESOP 12 trustee that, I guess, was shared with the 13 company in late October. I believe that there 14 was a line item there where they are comparing 15 the present value -- what I understood to be 16 the present value from the tax savings to the 17 present value that the ESOP would have received 18 had they not done the transaction. 19 So I believe those are the two 20 places where I've seen references to present 21 value; but it's interestingly missing from the 22 board presentations, at least in terms of the 23 PowerPoint pieces. 24 Q. And are those the board 25 presentations that Deloitte made to the board?</p>



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<p>1 I'm not sure what board presentations you're 2 talking about.</p> <p>3 A. Well, they would have been -- I 4 believe there were -- we may be going back to 5 the one in July that you mentioned earlier, 6 possibly the one in August, and, you know, 7 subsequently there were -- I think they did 8 those in October as well, at the end of 9 October. The representation was that there 10 were substantial dollars to be gained over 11 time.</p> <p>12 Again, there's no -- I don't 13 see -- did not see in here a discussion of 14 aggregate and then when you get the aggregate, 15 you know, how much -- what percentage is 16 everybody getting, the Morgans versus everybody 17 else.</p> <p>18 On the conflict page --</p> <p>19 Q. Well, I'm not sure, are you still 20 answering my question? Is this a different -- 21 I'm just trying to get the universe of 22 omissions.</p> <p>23 A. Omissions. Yeah, I'm trying to 24 get -- yeah, this -- yeah.</p> <p>25 Q. Okay. So --</p>	<p>1 And, you know, while there are 2 balance sheets, you know, it seems to me there 3 could be a clearer disclosure and possibly 4 there could have been a clearer disclosure to 5 the board, maybe there was, I don't know; but 6 in terms of present values, you know, what are 7 we getting today versus what we're giving out 8 today.</p> <p>9 Q. And in terms of your counsel's 10 objection that I asked for a legal conclusion, 11 what expertise do you bring to bear in offering 12 the opinion of what should have been disclosed 13 in this document?</p> <p>14 A. Well, I think it's a question of, 15 you know, what any person looking at this would 16 say. If I have shares in this company, what's 17 going to matter to me? I mean, does it matter 18 to me that if I do this deal, somebody might be 19 able to come get the money back from me in the 20 future? It might.</p> <p>21 Q. And --</p> <p>22 A. Does it matter to me if, you 23 know --</p> <p>24 Q. Well, let's take a step --</p> <p>25 A. Sure.</p>
Page 131	Page 133
<p>1 A. One omission is, you know, there's 2 no sources and uses and there's no comparison 3 of present values to the company, what's going 4 out in December versus what does the company 5 expect to get back for it.</p> <p>6 Q. I don't understand. First of all, 7 what do you mean by sources and uses?</p> <p>8 A. Well, there are several sources 9 and uses in the documents, the presentations to 10 the boards. Where the dollars are coming from, 11 bank debt, you know, versus what it's going to.</p> <p>12 Q. Okay. With regard to sources, are 13 you testifying that this document doesn't 14 disclose the sources of the cash that's going 15 to be used to fund the transaction?</p> <p>16 A. No, the aggregate amounts. It 17 shows -- it totals up to two forty-four -- two 18 hundred and forty-four million bucks, I 19 believe, or two hundred and forty-five million 20 dollars, and you see them in terms of the 21 transaction of, you know, so much for the 22 warrants, so much for the -- and then where is 23 the cash coming from to pay for those things 24 or, you know, what's the -- that I'm not seeing 25 in here.</p>	<p>1 Q. The people who they'd be clawing 2 the money back from are the people that you're 3 attempting to claw the money back from in this 4 lawsuit, correct?</p> <p>5 A. Correct.</p> <p>6 Q. Okay.</p> <p>7 A. Yes.</p> <p>8 Q. Anyone else --</p> <p>9 A. Among others.</p> <p>10 Q. Well, and who are those others?</p> <p>11 A. Well --</p> <p>12 Q. The ESOP certainly didn't tender 13 any shares or give any money or get any money 14 from the transaction, correct?</p> <p>15 A. I think, we're -- the list of 16 people is on Exhibit 294, right?</p> <p>17 Q. Oh, I don't know, sir. I didn't 18 see 294. You had mentioned it. I don't know 19 what it is.</p> <p>20 A. Yeah. That is the tally of 21 shareholder transmittals --</p> <p>22 Q. Okay.</p> <p>23 A. -- offer to purchase shares, 24 December 15th, 2003.</p> <p>25 Q. All right. And would you say the</p>

<p style="text-align: right;">Page 134</p> <p>1 Morgans are the individuals who tendered the</p> <p>2 majority of the shares and received the</p> <p>3 majority of the cash as reflected on 294 --</p> <p>4 A. Yes.</p> <p>5 Q. -- Exhibit 294? Okay. So if the</p> <p>6 Morgans felt the disclosure was accurate at</p> <p>7 least as to them, your omission is not</p> <p>8 particularly pertinent?</p> <p>9 A. I don't agree with that at all.</p> <p>10 Q. Okay. Who else should that</p> <p>11 disclosure have been made to other than the</p> <p>12 Morgans?</p> <p>13 A. The -- everyone to whom this was</p> <p>14 sent the disclosure should have been accurate.</p> <p>15 Are you suggesting that they should send less</p> <p>16 than accurate disclosures to one group of</p> <p>17 people and more than accurate disclosures to</p> <p>18 another?</p> <p>19 Q. No, you're asking for a disclosure</p> <p>20 that relates to clawback of money; and as far</p> <p>21 as I know, the only parties that received money</p> <p>22 in the transaction were the individuals that</p> <p>23 tendered outside shares.</p> <p>24 A. Uh-huh.</p> <p>25 Q. So other than those individuals,</p>	<p style="text-align: right;">Page 136</p> <p>1 margin? Not that the vote or that the</p> <p>2 shareholders vote was necessarily required to</p> <p>3 have that done but they did and it's out there.</p> <p>4 And if you're going to make that</p> <p>5 level of disclosure, it strikes me that</p> <p>6 everyone should receive the same disclosure and</p> <p>7 they -- you know, clearly no one received, in</p> <p>8 the Trust's view, adequate disclosure of what</p> <p>9 went on here.</p> <p>10 Q. Well, you say what went on here.</p> <p>11 We're talking --</p> <p>12 A. Of this transaction basically and</p> <p>13 issues with respect to the transaction and</p> <p>14 risks with respect to the transaction.</p> <p>15 Q. Okay. What else, other than the</p> <p>16 lack of disclosure that a number of</p> <p>17 shareholders might have money clawed back from</p> <p>18 them and the sources and uses disclosure that</p> <p>19 you referenced is a material omission from the</p> <p>20 disclosure documents, Exhibit 31, Exhibit 560?</p> <p>21 A. Well, let's be clear about the</p> <p>22 sources and uses so we don't cat -- what we're</p> <p>23 saying is -- what I'm saying is a present value</p> <p>24 analysis of the benefits, you know, what the</p> <p>25 company is giving up versus what --</p>
<p style="text-align: right;">Page 135</p> <p>1 to whom do you believe that disclosure was</p> <p>2 warranted?</p> <p>3 A. I think that everyone who received</p> <p>4 a copy of this document.</p> <p>5 Q. Okay. Even if they were not</p> <p>6 tendering shares and weren't at risk of having</p> <p>7 any money taken back from them had the</p> <p>8 transaction been unwound?</p> <p>9 A. Well, because is there not --</p> <p>10 Q. Well, the answer is really just</p> <p>11 yes or no to that question and then you can</p> <p>12 explain it.</p> <p>13 Do you believe that such a</p> <p>14 disclosure of a risk should be made to</p> <p>15 individuals who were not receiving money that</p> <p>16 might be clawed back at some point in the</p> <p>17 future by someone like you who chooses to bring</p> <p>18 a lawsuit?</p> <p>19 A. Yes, and, again -- yes, I do.</p> <p>20 Q. Okay. And why? Why is that your</p> <p>21 opinion?</p> <p>22 A. Because if you're going to</p> <p>23 disclose -- they had asked that the</p> <p>24 shareholders vote -- the participants vote with</p> <p>25 respect to this, right, as to approval of the</p>	<p style="text-align: right;">Page 137</p> <p>1 Q. Oh, I understood what you</p> <p>2 testified to.</p> <p>3 A. Okay.</p> <p>4 Q. Other than that and other than the</p> <p>5 omission that someone like you might come along</p> <p>6 and file a lawsuit to claw the money back, what</p> <p>7 other material omissions were made or exist</p> <p>8 with regard to the disclosure document that's</p> <p>9 Exhibit 560 and Exhibit 31?</p> <p>10 A. I think I mentioned in my earlier</p> <p>11 answers, although I wasn't clear that I was</p> <p>12 answering in two different areas, any</p> <p>13 disclosure with respect to how they got to the</p> <p>14 equity holder's agreement. I think I testified</p> <p>15 to that earlier in the context of what I guess</p> <p>16 you were now calling instead of omissions, I</p> <p>17 guess, inaccuracies or inconsistent -- I'm</p> <p>18 sorry, I've forgotten your word, but I believe</p> <p>19 that -- and that was in reference to an earlier</p> <p>20 part of the document. That -- that I -- that</p> <p>21 that -- if you want to throw something under</p> <p>22 the omissions heading, that is one of those</p> <p>23 things.</p> <p>24 Q. How they got to the equity</p> <p>25 holder's agreement? I don't understand what</p>

<p style="text-align: right;">Page 138</p> <p>1 you mean.</p> <p>2 A. The back-and-forth between Duff &amp;</p> <p>3 Phelps and Houlihan and the company that</p> <p>4 resulted in the equity holder's agreement that</p> <p>5 is represented in here to not be a condition of</p> <p>6 the deal or a condition that the company can</p> <p>7 waive when, in fact, it cannot.</p> <p>8 Q. Okay. Anything in addition to --</p> <p>9 A. I mean, I think it's material to</p> <p>10 know that somebody -- that one of the</p> <p>11 professionals looked at this and said that the</p> <p>12 price is too high.</p> <p>13 Q. Okay.</p> <p>14 A. And their solution for that was</p> <p>15 not to lower the price but to take more out.</p> <p>16 Q. What professional are you</p> <p>17 referring to?</p> <p>18 A. Duff &amp; Phelps.</p> <p>19 Q. Okay. Are you aware that</p> <p>20 ultimately Duff &amp; Phelps analyzed the share</p> <p>21 price and found that the eight hundred and</p> <p>22 fifty share price fell within the range that</p> <p>23 was acceptable to them?</p> <p>24 A. They issued an opinion to the ESOP</p> <p>25 trustee that said that the transaction was fair</p>	<p style="text-align: right;">Page 140</p> <p>1 Q. Well, there was negotiation --</p> <p>2 A. Uh-huh.</p> <p>3 Q. -- and I'm asking whether you can</p> <p>4 identify any fact indicating that Duff &amp; Phelps</p> <p>5 advised GreatBanc that eight hundred and</p> <p>6 fifty -- eight hundred and fifty dollars per</p> <p>7 share was not a fair price?</p> <p>8 MS. ANDREW: To whom?</p> <p>9 BY MR. SCHEIER:</p> <p>10 Q. To any constituency in the</p> <p>11 transaction.</p> <p>12 A. They weren't looking at it from a</p> <p>13 perspective of the company.</p> <p>14 Q. Okay. Then from the perspective</p> <p>15 of the ESOP --</p> <p>16 A. From the perspective --</p> <p>17 Q. -- do you know of any facts</p> <p>18 indicating that Duff &amp; Phelps advised GreatBanc</p> <p>19 the eight hundred and fifty dollars per share</p> <p>20 to be paid to the selling shareholders was</p> <p>21 unfair from a financial perspective to the</p> <p>22 ESOP?</p> <p>23 A. Again, I guess aside from the</p> <p>24 back-and-forth that ensued from the September</p> <p>25 time frame into October until they reached a</p>
<p style="text-align: right;">Page 139</p> <p>1 to the ESOP from a financial point of view and</p> <p>2 that any dilution caused as a result of the</p> <p>3 share price or the transaction was adequately</p> <p>4 addressed and it was adequately addressed, as I</p> <p>5 understand it, through the terms of the equity</p> <p>6 holder's agreement.</p> <p>7 Q. Okay. So bottom line is that</p> <p>8 the -- do you have -- do you know of any facts</p> <p>9 that either Duff &amp; Phelps or GreatBanc</p> <p>10 disagreed that eight hundred and fifty dollars</p> <p>11 was a fair price to pay the tendering</p> <p>12 shareholders for their shares in the context of</p> <p>13 the transaction?</p> <p>14 MS. ANDREW: I'm going to object to</p> <p>15 the form.</p> <p>16 THE WITNESS: They -- there was</p> <p>17 definitely a lot of back-and-forth --</p> <p>18 BY MR. SCHEIER:</p> <p>19 Q. Well, I understand there was</p> <p>20 negotiation.</p> <p>21 A. -- right?</p> <p>22 Q. What I'm asking is whether Duff &amp;</p> <p>23 Phelps or GreatBanc --</p> <p>24 A. There was a negotiation. So there</p> <p>25 was an issue whether that was correct.</p>	<p style="text-align: right;">Page 141</p> <p>1 deal, they both ended up settling on the eight</p> <p>2 fifty number, so no; but neither of them were</p> <p>3 looking out for the company. Neither of them</p> <p>4 were retained to issue an opinion.</p> <p>5 Q. I understand you want to kind of</p> <p>6 express on the record your client's position in</p> <p>7 the case, but I'm not interested in that. I'm</p> <p>8 interested in facts, not your opinion.</p> <p>9 The facts are that Duff &amp; Phelps</p> <p>10 deemed eight hundred and fifty dollars per</p> <p>11 share to be a price that was financially fair</p> <p>12 to the ESOP and its participants; is that</p> <p>13 right, based on your review of the record?</p> <p>14 MS. ANDREW: Object to the form.</p> <p>15 THE WITNESS: Yes, for the limited</p> <p>16 purpose that they were doing it, which was for the</p> <p>17 ESOP, that's what they settled on.</p> <p>18 BY MR. SCHEIER:</p> <p>19 Q. Very well. And other than what</p> <p>20 we've discussed to this point, what disclosure</p> <p>21 do you believe should have been made that</p> <p>22 wasn't made in addition to the ones you've</p> <p>23 testified to so far in the record?</p> <p>24 A. In the conflicts of interest, I</p> <p>25 don't see the officers listed.</p>

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<p>1 Q. Okay. Do you understand that</p> <p>2 conflicts of interest section to be a</p> <p>3 disclosure of directors who would be voting on</p> <p>4 the transaction and financial interests that</p> <p>5 they have?</p> <p>6 A. I do, but I don't see them</p> <p>7 disclosed anywhere else either. I mean the</p> <p>8 officers.</p> <p>9 Q. I understand. Is it your</p> <p>10 understanding the officers -- is it correct to</p> <p>11 say that based on your review of the record,</p> <p>12 the officers of the company had no right to</p> <p>13 vote one way or the other on whether the</p> <p>14 company would pursue the transaction?</p> <p>15 A. That is my understanding. Yes,</p> <p>16 that's correct.</p> <p>17 Q. Very well. Any other omission</p> <p>18 that you can identify that in your opinion</p> <p>19 should have been disclosed?</p> <p>20 A. Well, I want to go back to the</p> <p>21 last point that you made.</p> <p>22 Q. I didn't make any point. I'm just</p> <p>23 asking questions.</p> <p>24 A. Okay. With respect to the</p> <p>25 officers, one of the officers who profited</p>	<p>1 the record here and understand the Trust's</p> <p>2 position and you were supposed to be prepared</p> <p>3 to testify to the Trust's position. So I guess</p> <p>4 I need to ask, as we sit here today --</p> <p>5 A. Uh-huh.</p> <p>6 Q. -- are you satisfied now that</p> <p>7 you've testified completely and accurately as</p> <p>8 to what the Trust views as either omissions</p> <p>9 from the disclosures or inaccurate disclosures</p> <p>10 in Exhibits 560 and 31, which are the same</p> <p>11 document?</p> <p>12 A. I believe that I have so testified</p> <p>13 to the best of my recollection. Again, I don't</p> <p>14 view this as -- and it shouldn't be, I don't</p> <p>15 think, a test of your memory.</p> <p>16 Q. No, your counsel mentioned that</p> <p>17 earlier and I've been very solicitous of</p> <p>18 letting you take time off the record and look</p> <p>19 at the thirty binders you have right behind</p> <p>20 you. What I'm inviting you to do is to do that</p> <p>21 so when I leave here today your lawyer doesn't</p> <p>22 put something in a brief or in other papers</p> <p>23 that you didn't testify to saying that you just</p> <p>24 didn't remember. So I'm inviting you again go</p> <p>25 off the record and look at the twenty-five or</p>
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<p>1 significantly from the transaction obviously</p> <p>2 was Barry Hoskins who was the CFO. There's no</p> <p>3 disclosure in here that I've seen that explains</p> <p>4 how much he's getting out of this. And --</p> <p>5 Q. Well, is it your --</p> <p>6 A. -- you know, a lot of this is</p> <p>7 based upon financial information, et cetera,</p> <p>8 and there's a lot of financial information in</p> <p>9 here. That strikes me that that would be, you</p> <p>10 know, a relevant fact, a material fact that</p> <p>11 somebody might want to know about.</p> <p>12 Q. You haven't alleged in your</p> <p>13 complaint that Barry Hoskins did anything wrong</p> <p>14 with regard to the 2003 transaction; isn't that</p> <p>15 right?</p> <p>16 A. That is correct.</p> <p>17 Q. Okay. Very well. Anything else</p> <p>18 that you deem to be in your opinion an omission</p> <p>19 from the disclosure statement that should have</p> <p>20 been disclosed?</p> <p>21 A. I think, as I sit here right now,</p> <p>22 that's what I'm remembering.</p> <p>23 Q. Okay. And is there any document</p> <p>24 that you should look at now that would have you</p> <p>25 remember anything else because I need to close</p>	<p>1 thirty binders to determine whether or not</p> <p>2 there's any other omission or inaccuracy</p> <p>3 relating to Exhibits 560 and 31 so I understand</p> <p>4 the full position of the Trust as we sit here</p> <p>5 today.</p> <p>6 A. Well -- I think that I am -- based</p> <p>7 on everything I've seen here, I'm comfortable</p> <p>8 with that notion, say, for the financial</p> <p>9 information in this that would be subject to</p> <p>10 review by an expert witness, you know, that</p> <p>11 piece. I'm not a financial expert, I'm not a</p> <p>12 valuation expert so, you know, that piece -- I</p> <p>13 would say if there are inaccuracies in that</p> <p>14 piece of it, that's something that would be the</p> <p>15 subject of expert testimony.</p> <p>16 Q. As you sit here today, has anyone</p> <p>17 brought to your attention that there are</p> <p>18 inaccuracies in those financial disclosures?</p> <p>19 A. No.</p> <p>20 Q. Okay. Do you consider yourself an</p> <p>21 expert in the area of disclosures as required</p> <p>22 by the SEC when it comes to public companies</p> <p>23 and tender offer transactions that they enter</p> <p>24 into?</p> <p>25 A. No.</p>

<p style="text-align: right;">Page 146</p> <p>1 Q. Okay. I'd like to, if you could,</p> <p>2 please, Mr. Miller, put Exhibit 31 aside and</p> <p>3 place before you again Exhibit 42. And if you</p> <p>4 would please direct your attention to count</p> <p>5 thirteen on page fifty-two.</p> <p>6 Is the trustee continuing to</p> <p>7 pursue attorney's fees from any of the</p> <p>8 defendants in this action?</p> <p>9 A. Well, I think at the time that we</p> <p>10 did the amended complaint, as indicated in the</p> <p>11 complaint, that there are -- were Ohio case law</p> <p>12 giving Ohio trial courts the discretion to</p> <p>13 award attorney's fees.</p> <p>14 Q. Did you review any of that case</p> <p>15 law yourself?</p> <p>16 A. I did not.</p> <p>17 Q. Do you believe that that case law</p> <p>18 in fact exists as we sit here today?</p> <p>19 A. I have no reason to believe that</p> <p>20 it does not.</p> <p>21 Q. Okay. You're not basing your</p> <p>22 attorney's fees claim on any particular fee</p> <p>23 shifting provision in any contract that we're</p> <p>24 talking about in this case --</p> <p>25 A. No, sir.</p>	<p style="text-align: right;">Page 148</p> <p>1 THE VIDEOGRAPHER: We're on the</p> <p>2 record.</p> <p>3 CROSS-EXAMINATION</p> <p>4 BY MR. PRENTISS:</p> <p>5 Q. Mr. Miller, I am Dan Prentiss. I</p> <p>6 represent James Northrop who is an outside</p> <p>7 director whom you've sued. Just before I</p> <p>8 started you asked to have a few documents in</p> <p>9 front of you in order to be prepared to answer</p> <p>10 my questions.</p> <p>11 A. Yes.</p> <p>12 Q. Can you just identify what</p> <p>13 documents you wanted to get?</p> <p>14 A. I have Exhibit 631, which is an</p> <p>15 Antioch Company contingency plan. I have an</p> <p>16 Exhibit 401, which is the April 19th, 2006</p> <p>17 minutes of The Antioch Company board of</p> <p>18 directors meeting. I have a Exhibit 188, which</p> <p>19 is the J.H. Whitney &amp; Company offer of May 8th,</p> <p>20 2008. And then, let's see, I have Exhibit 432,</p> <p>21 which is e-mails dated May 9th, 2008. Let's</p> <p>22 see. I guess I have Exhibit 271, which is our</p> <p>23 e-mails dated May 19th, 2008. Exhibit 438,</p> <p>24 also an e-mail string from about that same time</p> <p>25 period. Exhibit 278, a May 28th, 2008 e-mail.</p>
<p style="text-align: right;">Page 147</p> <p>1 Q. -- is that right?</p> <p>2 A. No.</p> <p>3 Q. And you're not basing your</p> <p>4 attorney's fees claim on any statute that would</p> <p>5 shift fees from the plaintiff to the</p> <p>6 defendants --</p> <p>7 A. No.</p> <p>8 Q. -- in this -- if you'd let me</p> <p>9 finish.</p> <p>10 A. Oh, I'm sorry.</p> <p>11 Q. Okay. To a piece of -- in your</p> <p>12 attorney's fees claim you're not relying on any</p> <p>13 statute that shifts the responsibility for</p> <p>14 attorney's fees from a plaintiff like yourself</p> <p>15 to defendants in the case; is that right?</p> <p>16 A. That is correct.</p> <p>17 Q. Okay.</p> <p>18 MR. SCHEIER: At this point,</p> <p>19 Mr. Miller, I have no further questions. Thank</p> <p>20 you for your time.</p> <p>21 THE WITNESS: Thank you.</p> <p>22 MS. ANDREW: Off the record.</p> <p>23 THE VIDEOGRAPHER: We're off the</p> <p>24 record.</p> <p>25 (Pause in proceedings.)</p>	<p style="text-align: right;">Page 149</p> <p>1 Exhibit 506, May 28th, 2008 e-mail string.</p> <p>2 June the 3rd, 2008 e-mail string is Exhibit</p> <p>3 430. I'm sorry, Exhibit 430, which is a June</p> <p>4 the 3rd, 2008 e-mail string. Exhibit 324,</p> <p>5 which is a June the 4th, 2008 e-mail string.</p> <p>6 And that appears to be all of them.</p> <p>7 Q. What is it about those documents</p> <p>8 that you -- that made you select those to be</p> <p>9 prepared to answer my questions?</p> <p>10 A. Those are all documents -- well,</p> <p>11 those are all documents that Mr. Northrop is</p> <p>12 mentioned in or -- as having, I think -- at</p> <p>13 least in terms of the e-mail is copied on or</p> <p>14 things as special committee he should have</p> <p>15 gotten, and this contingency plan, I believe,</p> <p>16 is something that he prepared for the</p> <p>17 company --</p> <p>18 Q. All right.</p> <p>19 A. -- early on. I think that's the</p> <p>20 universe that's -- that's not to say -- that's</p> <p>21 why they're here. That's not to say that those</p> <p>22 are the universe of documents relevant to him.</p> <p>23 Q. All right. In -- by 2007, is it</p> <p>24 true that The Antioch Company was in severe</p> <p>25 financial distress and the zone of insolvency?</p>



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<p>1 A. The company was rendered balance 2 sheet insolvent by the 2003 ESOP transaction; 3 and if you look at the financials annually, 4 that never changes. So in terms of being in 5 the zone of insolvency, yes, I mean, I think 6 they were there. And in terms of the financial 7 situation, they were having to do a sale and a 8 leaseback of the real estate to be able to get 9 the banks to renew and extend their credit 10 agreement, so yes. 11 Q. So the answer is yes? 12 A. Yes. 13 Q. The answer is yes -- 14 A. Yes. 15 Q. -- in 2007 -- 16 A. Yes. 17 Q. -- the company was in severe 18 financial distress -- 19 A. Yes. 20 Q. -- and in the zone of insolvency? 21 A. Yes. 22 Q. And is it true that in those 23 circumstances, the proper and prudent course of 24 action for the board of Antioch to take would 25 be to maximize the value of the company for the</p>	<p>1 Q. So the board in voting to enter 2 into an agreement with Houlihan Lokey in March 3 of 2007 was not breaching its fiduciary duties 4 as board members, correct? 5 A. Yes. I'm not aware that they 6 were, no. 7 Q. Well -- 8 A. Yes. I mean, I -- 9 Q. You have sued members of the board 10 for breach of fiduciary duty. 11 A. Yes. 12 Q. You're agreeing with me that the 13 hiring of Houlihan Lokey in March of 2007 was 14 not such a breach, correct? 15 A. Correct. 16 Q. And when the board modified the 17 agreement with Houlihan Lokey in January 2008, 18 that also was a prudent and appropriate course 19 of action for the board to take, correct? 20 A. No. 21 Q. Are you familiar with what 22 Houlihan Lokey was tasked to do under the 23 January 2008 modification to its agreement? 24 A. Why don't we see a copy of it. 25 Q. I'll pass you down Exhibit 208.</p>
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<p>1 maximum number of stakeholders through pursuit 2 of the sale of the company to a third party 3 through a change of control transaction? 4 A. I think that -- yes, I think that 5 is the -- yes, that they -- 6 Q. Thank you. 7 A. -- should have maximized the value 8 of the company. 9 Q. Your answer to my question is yes, 10 that is the prudent and appropriate course of 11 action the board should have taken in 2007, 12 correct? 13 A. Correct. 14 Q. And, in fact, that is what the 15 board hired Houlihan Lokey to do in March of 16 2007, correct? 17 A. Yes. 18 Q. So you have no quarrel and you 19 agree that what -- the action of the board in 20 hiring Houlihan Lokey in March of 2007 was a 21 prudent and appropriate course of action for 22 the board to take at that time? 23 A. At that juncture, that appeared to 24 be, yes, something that the -- yes, a prudent 25 course of action on the board's part then.</p>	<p>1 Do you have that -- you're familiar with 2 Exhibit 208, are you not? 3 A. I have definitely seen it, yes. 4 Q. And Exhibit 208, the first four 5 pages are -- constitute the January 25, 2008 6 modification to the Houlihan Lokey agreement 7 executed in March of 2007, correct? 8 A. I'm sorry, run that by me again. 9 Q. Yes. 10 A. Could you read it back? 11 Q. The first four pages of Exhibit 12 208 -- 13 A. Uh-huh. 14 Q. -- constitutes the modification to 15 the March 2007 agreement between Antioch and 16 Houlihan Lokey, correct? 17 A. Yes, that is what it says. Yes. 18 Q. And page two of Exhibit 208 19 defines the task that Houlihan Lokey was to 20 pursue under this modification of the 21 agreement, correct? 22 A. We're looking at page two up here 23 at the top under A for the purposes of this 24 agreement and transaction, is that what you're 25 referring to?</p>

<p style="text-align: right;">Page 154</p> <p>1 Q. I'm -- that's exactly correct.</p> <p>2 A. Okay.</p> <p>3 Q. And would you agree with me that</p> <p>4 the transaction as defined there, that</p> <p>5 paragraph of this modification of the</p> <p>6 agreement, is a sale of the company to a third</p> <p>7 party through a change of control transaction?</p> <p>8 A. Let me just --</p> <p>9 MS. ANDREW: Objection.</p> <p>10 THE WITNESS: If you would just let</p> <p>11 me take a moment to read it, I would appreciate</p> <p>12 it.</p> <p>13 BY MR. PRENTISS:</p> <p>14 Q. Take all the time you need.</p> <p>15 A. Thank you. Yes. I think the</p> <p>16 answer to the question is yes. They were -- it</p> <p>17 contemplates a change in control transaction,</p> <p>18 among other things.</p> <p>19 Q. So as of January 2008, was it</p> <p>20 still a prudent and appropriate course of</p> <p>21 action for the board of The Antioch Company to</p> <p>22 pursue a sale of the company to a third party</p> <p>23 in a change of control transaction?</p> <p>24 A. Yes --</p> <p>25 Q. And --</p>	<p style="text-align: right;">Page 156</p> <p>1 did not Houlihan at the behest of the special</p> <p>2 committee agree that they were not going to</p> <p>3 talk to anybody who they hadn't talked to as of</p> <p>4 the end of December? Wasn't that part of the</p> <p>5 deal? And I'm looking through this document</p> <p>6 looking for that right now but --</p> <p>7 Q. I'm not here to answer your</p> <p>8 questions, Mr. Miller. I'm asking you whether</p> <p>9 this agreement -- the entering into this</p> <p>10 agreement in January of 2008 by the Houlihan --</p> <p>11 by the Antioch board was in pursuit of the</p> <p>12 prudent and appropriate course of action for</p> <p>13 the board, which is to seek a third-party buyer</p> <p>14 in a change of control transaction?</p> <p>15 A. Oh, here we are. I guess -- in</p> <p>16 looking at this, my recollection of the</p> <p>17 documents were that Houlihan agreed to limit</p> <p>18 who it was going to sell to, who it was going</p> <p>19 to market to; and so engaging them, while in</p> <p>20 the abstract the question you're asking, is it</p> <p>21 not prudent that they're engaging somebody to</p> <p>22 engage in a sale transaction, your question</p> <p>23 ignores the fact that Houlihan under their</p> <p>24 initial engagement brought parties in and in</p> <p>25 November of '07 those parties disappear, in</p>
<p style="text-align: right;">Page 155</p> <p>1 A. -- it was.</p> <p>2 Q. -- this agreement, the March</p> <p>3 2008 -- excuse me, January 2008 amendment to</p> <p>4 the Houlihan Lokey agreement, continues to task</p> <p>5 Houlihan Lokey with being an investment banker</p> <p>6 to find a purchaser -- a third-party purchaser</p> <p>7 of the company in a change of control</p> <p>8 transaction, correct?</p> <p>9 A. Correct. It -- yes, it does.</p> <p>10 Uh-huh.</p> <p>11 Q. So this -- the continuation of the</p> <p>12 relationship between Antioch and Houlihan Lokey</p> <p>13 in January 2008 was a prudent and appropriate</p> <p>14 course of action for the board to take,</p> <p>15 correct?</p> <p>16 A. Well --</p> <p>17 MS. ANDREW: Objection.</p> <p>18 THE WITNESS: But this isn't</p> <p>19 everything that was going on.</p> <p>20 BY MR. PRENTISS:</p> <p>21 Q. I didn't ask you that, Mr. Miller.</p> <p>22 A. I understand you didn't.</p> <p>23 Q. So let's just focus on my</p> <p>24 question.</p> <p>25 A. Well, but in connection with this,</p>	<p style="text-align: right;">Page 157</p> <p>1 particular Sun Capital, with really no</p> <p>2 explanation as to why that happened and why it</p> <p>3 went away, yet with Houlihan and everybody</p> <p>4 saying, gee, we need to make a counter to Sun.</p> <p>5 Because in terms of the valuations, Sun was the</p> <p>6 one who came back with we're going to take care</p> <p>7 of the debt and I think some portion of --</p> <p>8 something beyond just the secured debt, the</p> <p>9 bank debt.</p> <p>10 And that went away and it went</p> <p>11 away in favor of a proposal that was put on the</p> <p>12 table by Candlewood and Lee Morgan in the late</p> <p>13 October time frame that -- my understanding</p> <p>14 that -- I confuse them a little bit in my head,</p> <p>15 but my recollection was Houlihan was not in</p> <p>16 favor of that but acquiesced. And so you have</p> <p>17 a situation where at the beginning of the year</p> <p>18 in January Houlihan is acquiesced and a buyer</p> <p>19 -- a potential buyer has gone away.</p> <p>20 So I'm troubled with the notion</p> <p>21 that it is -- that involving Houlihan without</p> <p>22 taking into consideration what's gone on before</p> <p>23 is automatically the prudent thing that the</p> <p>24 board should do. And particularly also, again,</p> <p>25 I recall e-mail correspondence between Nancy</p>

<p style="text-align: right;">Page 158</p> <p>1 Blair -- I think it's Nancy Blair and Houlihan  2 regarding their agreement not to solicit anyone  3 else because right at this time Lee Morgan is  4 sending his letter to the special committee,  5 January 2nd or whenever that was, 2008, saying  6 I'm not going to waive my subdebt and you need  7 to give me more access and this, that, and the  8 other. And so the special committee is  9 acquiescing in that on a go-forward.  10 Q. We'll talk about acquiescing. I'm  11 asking you specific reference to the January  12 25, 2008 agreement. Is there any term of this  13 agreement that was authorized by the Antioch  14 board which you feel is -- constitutes a breach  15 of fiduciary duty by the board in agreeing to  16 that term?  17 A. Aside from, again, what I've just  18 stated, the fact that Houlihan appears to have  19 acquiesced in not moving forward with a sale of  20 the company in the fall 2007 time frame and  21 whether or not under those circumstances  22 Houlihan should continue to be retained because  23 that piece isn't clear, this agreement itself,  24 the notion that Houlihan should be protected in  25 the event of a bankruptcy filing that they get</p>	<p style="text-align: right;">Page 160</p> <p>1 Q. The board of directors voted to  2 enter into a modification of the Houlihan Lokey  3 agreement.  4 A. Uh-huh.  5 Q. And the company did so as of  6 January 25, 2008.  7 A. Yes.  8 Q. Was that a breach of fiduciary  9 duty by the board members who voted?  10 MS. ANDREW: Objection. Foundation.  11 THE WITNESS: Again, I think without  12 explanation from Houlihan with respect to their  13 acquiescence as to why this didn't go forward --  14 why the Sun deal didn't go forward and why they  15 didn't move forward and Houlihan insist upon a 363  16 sale in this circumstance, and those are all  17 questions the board should be asking, I mean --  18 prior to entering into this.  19 BY MR. PRENTISS:  20 Q. But the board -- do you agree that  21 the board did authorize this amendment to the  22 agreement?  23 A. They clearly did.  24 Q. And was that authorization a  25 breach of their fiduciary duty?</p>
<p style="text-align: right;">Page 159</p> <p>1 their fees and that they're going to continue  2 to market the company, I -- I'm troubled by it,  3 I guess. I can't -- you know, I'm sorry but  4 I'm troubled by it.  5 Q. All right. You're troubled by it,  6 but you've made an allegation in the complaint  7 that certain people breached their fiduciary  8 duties.  9 A. Yes.  10 Q. You know that, right?  11 A. Yes.  12 Q. Is it your testimony that the  13 board of directors of Antioch breached their  14 fiduciary duties by signing this amendment to  15 the Houlihan Lokey agreement?  16 MS. ANDREW: Objection. Foundation.  17 The board didn't sign the letter.  18 THE WITNESS: I think -- it's not  19 clear to me that the board considered the impact  20 of basically every --  21 BY MR. PRENTISS:  22 Q. Mr. Miller, the question asks --  23 you have made allegations of breach of  24 fiduciary duty.  25 A. Uh-huh.</p>	<p style="text-align: right;">Page 161</p> <p>1 MS. ANDREW: Objection to the extent  2 it calls for a legal conclusion.  3 THE WITNESS: Again, I think they  4 failed to take into consideration in entering into  5 this --  6 BY MR. PRENTISS:  7 Q. You know, we're going to be here  8 for a long time. I mean, there's -- there's a  9 yes or a no answer to that question. I suppose  10 there's an I don't know if you want to pick  11 that one.  12 Did the authorization of the  13 January 25, 2008 Houlihan Lokey agreement  14 constitute a breach of fiduciary duty? Yes,  15 no, I don't know?  16 A. Again, I have a hard time  17 divorcing it from the -- from what went on.  18 You can't take it out --  19 Q. You can't answer the question?  20 A. You can't take it out of the  21 context.  22 Q. If you can't answer the question,  23 that's okay, too.  24 A. Well, I mean, my view of it is  25 that the company needed to do a sale</p>

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<p>1 transaction and Houlihan was in the best 2 position to make that happen but they didn't 3 make that happen. It's not clear why it didn't 4 happen with the Sun -- in the Sun transaction. 5 And in January of '08 if the board 6 isn't going to pursue a 363 transaction here, 7 and, again -- you know, Houlihan is acquiescing 8 in not doing that, they're not the ones to get 9 the company -- to maximize the value for the 10 company here. 11 Q. That's the answer to my question? 12 That's your answer? 13 A. Well, I question, I guess, the 14 board's continuing to involve Houlihan when the 15 Sun deal went away; but I suppose at this 16 juncture, you know, somebody needed to be in 17 there selling the company. 18 Q. So what's your source of 19 information regarding Sun Capital? You've 20 talked about Sun Capital having an interest and 21 then not having an interest. Where do you get 22 your information about Sun Capital? 23 A. Well, there are e-mails to that 24 effect. 25 Q. Whose e-mails?</p>	<p>1 you've derived from various documents, right? 2 A. Yes, that's what I'm doing. 3 Q. And your information about Sun 4 Capital is from Houlihan Lokey, correct? 5 A. Yes, and there are other -- you 6 know, Sun is mentioned, I presume -- I believe 7 in other e-mails from other people; but 8 certainly it's out there, yes. 9 Q. But the source of your information 10 when you're describing the course of the 11 negotiations with Sun Capital is Houlihan 12 Lokey's presentations to the Antioch board, 13 right? 14 A. Correct. And e-mail 15 correspondence following that, yes. 16 Q. By the way, does the Trust take 17 any position that Houlihan Lokey failed to 18 perform under the contracts which are Exhibit 19 208? 20 A. Well, I'd say it was a combination 21 of things. 22 Q. No. The question is, does the 23 Trust take the position that Houlihan Lokey 24 failed to perform its contractual obligations 25 under the agreement and the amended agreement</p>
Page 163	Page 165
<p>1 A. I believe there was something in 2 there from Houlihan about Sun having given an 3 expression of interest. 4 There's a -- Houlihan did a 5 lengthy timeline in early November about 6 everybody who was out there. 7 There were several e-mails 8 following on the '07 time frame about the need 9 to get back to Sun Capital and make a response 10 to Sun Capital because they had given a verbal 11 expression of interest with respect to the 12 company at the bank debt plus -- my 13 recollection is various things, but bank debt 14 plus some dollars. 15 Q. So would the answer to my question 16 be the source of your information regarding Sun 17 Capital is Houlihan Lokey? 18 A. Well, ultimately they were the 19 ones who were dealing and having that -- 20 Q. Right. 21 A. -- so, yes, they would have 22 been -- 23 Q. Yeah, I don't need the reasons. 24 You've tried to derive information -- you're 25 giving testimony regarding information that</p>	<p>1 which are in Exhibit 208? 2 A. I don't believe that the Trust 3 makes that allegation in the complaint. 4 Q. Well, does the Trust take the 5 position that Houlihan Lokey satisfied its 6 contractual obligations under its agreements 7 with Antioch? 8 A. In -- not -- I think in the 9 Trust's view, in not aggressively moving 10 forward to get the company to do a Section 363, 11 a bankruptcy-type sale, a change of control 12 transaction here, and in acquiescing in a 13 process that allowed what, from all 14 appearances, for some period of time had been a 15 melting ice cube, a company whose value is 16 decreasing over time through decreasing sales 17 and operations and it's overloaded with debt, 18 that in not really forcing the issue when the 19 initial valuation indications come back, that 20 there's only enough to pay a certain amount of 21 the debt here and there's nothing for the 22 equity, and instead of acquiescing in a process 23 where value continues to erode and a sale never 24 happens, you know, I think the Trust's position 25 is that that facilitated a breach of fiduciary</p>

<p style="text-align: right;">Page 166</p> <p>1 duty by the directors by not getting --</p> <p>2 maximizing the value here and selling the</p> <p>3 company and selling the assets at a time when</p> <p>4 the value can be maximized.</p> <p>5 And the delay was based upon</p> <p>6 what -- were proposals from the Morgan family</p> <p>7 and Candlewood, yet were not -- unfunded</p> <p>8 proposals. There was never financing obtained,</p> <p>9 and Lee Morgan was abundantly clear in a</p> <p>10 November e-mail -- '07 e-mail saying he was not</p> <p>11 going to put any more money into the company.</p> <p>12 So under those circumstances, as</p> <p>13 your -- the party that's supposed to sell the</p> <p>14 company, the valuations come in that the only</p> <p>15 way the company can get sold is in bankruptcy</p> <p>16 because you have to get consent of all the</p> <p>17 other classes below what the value is out</p> <p>18 there, the recommendation to the board has to</p> <p>19 be you need to sell this company in bankruptcy.</p> <p>20 When the board doesn't take your advice, you</p> <p>21 need to withdraw. That's the Trust's position.</p> <p>22 Q. Does that constitute a breach by</p> <p>23 Houlihan Lokey of its agreements with Antioch?</p> <p>24 A. As --</p> <p>25 MS. ANDREW: Objection.</p>	<p style="text-align: right;">Page 168</p> <p>1 A. That is correct.</p> <p>2 Q. Now, you filed -- you prepared</p> <p>3 answers to interrogatories with respect to my</p> <p>4 client, Mr. Northrop. Do you remember doing</p> <p>5 that?</p> <p>6 A. Yeah, I'm not sure. Let me see</p> <p>7 them.</p> <p>8 Q. Yeah.</p> <p>9 MR. PRENTISS: This is one I didn't</p> <p>10 make copies of. Why don't we mark that as I think</p> <p>11 the next one is 790. Do you have a sticker you</p> <p>12 can put on that somewhere.</p> <p>13 (Thereupon, Exhibit 790, The Antioch</p> <p>14 Company Litigation Trust's response to first set</p> <p>15 of interrogatories of James A. Northrop, was</p> <p>16 marked for purposes of identification.)</p> <p>17 BY MR. PRENTISS:</p> <p>18 Q. Now, do you recall compiling</p> <p>19 answers or signing a set of answers to</p> <p>20 questions submitted to you on behalf of</p> <p>21 Mr. Northrop?</p> <p>22 A. Yes, I do.</p> <p>23 Q. Okay. Do you remember being asked</p> <p>24 a question, the very first question, state all</p> <p>25 facts on the basis of which plaintiff, that's</p>
<p style="text-align: right;">Page 167</p> <p>1 THE WITNESS: I think that it</p> <p>2 constitutes a breach of their duty to the company</p> <p>3 in terms of what they -- but contractually is</p> <p>4 there anything that contractually requires them to</p> <p>5 force that? I don't see it in here.</p> <p>6 BY MR. PRENTISS:</p> <p>7 Q. Well, the only relationship here</p> <p>8 is contractual, right?</p> <p>9 A. Well -- correct.</p> <p>10 Q. And so if there's a duty, it's a</p> <p>11 duty that arises out of the contract, a duty</p> <p>12 from Houlihan Lokey to Antioch?</p> <p>13 A. But they're engaged to provide</p> <p>14 services to sell the company and provide their</p> <p>15 best advice at doing that, right? And the</p> <p>16 valuation indications came back considerably</p> <p>17 under, and the only way to do a sale in that</p> <p>18 circumstance is in bankruptcy, and they</p> <p>19 suggested that and the company didn't do it.</p> <p>20 Q. You didn't sue Houlihan Lokey for</p> <p>21 breach of contract, right?</p> <p>22 A. Correct. That is correct.</p> <p>23 Q. So even though you have questions,</p> <p>24 somehow your questions didn't rise to whatever</p> <p>25 your threshold was for actionable claim?</p>	<p style="text-align: right;">Page 169</p> <p>1 you, allege that Northrop allowed the Morgan</p> <p>2 family to pursue or failed to prevent the</p> <p>3 Morgan family from pursuing recapitalization</p> <p>4 alternatives?</p> <p>5 A. Uh-huh.</p> <p>6 Q. Do you remember that?</p> <p>7 A. Uh-huh.</p> <p>8 Q. You have to say yes or no.</p> <p>9 A. Oh, I'm sorry. Again, it -- yes.</p> <p>10 Q. And I'd like you to turn to page</p> <p>11 four of the document which is the second page</p> <p>12 of your answer to that first interrogatory</p> <p>13 number one.</p> <p>14 A. Uh-huh.</p> <p>15 Q. And among the things that you</p> <p>16 accuse my client of doing or failing to do is</p> <p>17 failed to provide the company with prudent</p> <p>18 direction and a necessary sense of urgency. Do</p> <p>19 you see that?</p> <p>20 A. I haven't found it yet but --</p> <p>21 Q. It's beginning of the latter part</p> <p>22 of the second line from the top.</p> <p>23 A. Oh, okay. Let me see.</p> <p>24 Q. Do you have it now?</p> <p>25 A. Yes, I do. Uh-huh.</p>



<p style="text-align: right;">Page 170</p> <p>1 Q. And is that your position, that 2 Northrop and the other board members in 2008 3 failed to provide the company with prudent 4 direction and a necessary sense of urgency? 5 A. Yes. 6 Q. And the necessary sense of urgency 7 relates back to your position that the company 8 was in dire financial straits and in the zone 9 of insolvency at least as early as 2007? 10 A. And declining in value. 11 Q. And declining in value? 12 A. Yes. 13 Q. Okay. Now, going back -- turn 14 back one page to page three of the document, 15 the first part of your answer where you 16 identify some of the things that you say 17 Mr. Northrop did wrong here as a board member. 18 And I want to look here at the -- it's about 19 seven or eight lines down in this answer on the 20 page where you say Northrop sanctioned the 21 pursuit of sale efforts by Houlihan Lokey while 22 simultaneously supporting or failing to stop 23 the efforts of the Morgan family. Do you see 24 that? 25 A. Yes. Uh-huh.</p>	<p style="text-align: right;">Page 172</p> <p>1 also then -- that was the backstopping of the 2 ESOP notes was in late May. 3 So there's this whole long string 4 of the company never moving to a sale process 5 and, you know, all the while there are at least 6 at this time three parties interested. Was it 7 Marlin, Monomoy, and J.H. Whitney interested in 8 doing a change of control sale transaction, and 9 all of those folks get put on hold with the 10 approval of the special committee. 11 Q. When you say put on hold, let's -- 12 I understand -- so Northrop did bad by 13 supporting the Morgan family effort to 14 recapitalize; and by supporting, you mean that 15 Northrop and the members of the board did not 16 sell to somebody else? Is that what you're 17 saying? 18 A. Did not maximize the value of the 19 company in a change of control transaction. 20 Q. Whose buyer they should have sold 21 to? 22 A. Whoever submitted the highest and 23 best bid for the company in an auction in a 24 bankruptcy, that's who they should have sold 25 to.</p>
<p style="text-align: right;">Page 171</p> <p>1 Q. What exactly did Northrop do to 2 support the efforts of the Morgan family? 3 A. Well, I mean, the entire special 4 committee of which Mr. Northrop was a part 5 continued to delay any sort of sale of the 6 company, a change of control sale, while 7 waiting on and getting proposals in February 8 and late January there was -- I believe it was 9 late January of '08 there was the Article 9 10 proposal, and then in February -- or maybe it 11 was February is the Article 9 proposal, again, 12 not -- my recollection of that, that there was 13 really no financing behind it. 14 And then the GSC deal, which was a 15 very complex term sheet with some significant 16 issues that I recall Houlihan expressed with 17 respect to that, yet then the special committee 18 voted to give exclusivity to GSC through the 19 March and April time period. And then in mid 20 April GSC decides that they're not going 21 forward. 22 And even up until May you have 23 Candlewood and the Morgans coming back then I 24 believe with the -- continuing to be looking 25 for other financing sources, I suppose, but</p>	<p style="text-align: right;">Page 173</p> <p>1 Q. So your testimony is that it's a 2 breach of fiduciary duty of the board of 3 directors of Antioch as of, let's say, March of 4 2008 for having refused to put the company into 5 bankruptcy at that point? 6 A. To have maximized the value of the 7 company. And, again, let's think about this. 8 Mr. Northrop was originally engaged as a 9 consultant and did this contingency analysis, 10 right? He knew that there were significant 11 issues with the company. 12 Those significant issues had been 13 out there for some amount of time, and, 14 frankly, traced their way back to the 2003 ESOP 15 transaction, and who is in control of the 16 company at all these times? Who's the CEO? 17 Who remains in control or remains the CEO? 18 After Mr. Northrop knowing all these issues 19 comes on and joins the board. 20 Q. So you've sued him for breach of 21 fiduciary duty. Is it your testimony that the 22 board and Mr. Northrop should have voted in 23 March of 2008 to file for bankruptcy? 24 A. If the indications of value were 25 coming back from the transaction -- or the</p>

<p style="text-align: right;">Page 174</p> <p>1 process that Houlihan ran, if those indications  2 were coming back in the fall that there's only  3 enough money to cover the debt -- the bank's  4 debt and a little bit beyond that and there's  5 nobody else out there, Mr. Morgan, who has  6 known about the sale process and the decision  7 to sell the company since February of 2007, and  8 in November has no financing or money to do it  9 with and is adamant that he's not going to put  10 more money in, that's the point in time at  11 which if the company -- if we're going to  12 maximize value, the maximization of the value  13 should have happened then.  14 Q. When? Then meaning when?  15 A. November -- November -- as soon as  16 a deal could have been struck, if one were to  17 be struck, between Sun and whomever or whomever  18 else may have come forward. Houlihan was  19 tasked at that point in time in going back out  20 and seeing if it could find distressed buyers  21 at that juncture. Whomever else it might have  22 found at that juncture.  23 Q. Well, did you read Houlihan's  24 presentation as to all of its efforts,  25 including Sun?</p>	<p style="text-align: right;">Page 176</p> <p>1 Capital --  2 A. No.  3 Q. -- ever submit a letter of intent?  4 A. No, they did not.  5 Q. Did --  6 A. But, again, the company -- from  7 the e-mail and from the documentation, it  8 appears that there was never a response to  9 their indication of interest.  10 Q. What form did the indication of  11 interest take?  12 A. It was verbal was -- from the  13 documentation.  14 Q. You ever seen Exhibit 183?  15 A. I'm sure I have.  16 Q. Do you recognize that?  17 A. Yes.  18 Q. It's a presentation by Houlihan  19 Lokey --  20 A. Yes.  21 Q. -- correct? And it's a  22 presentation that as of November 5, 2007, which  23 is intended to give a detailed and accurate  24 timeline of its work with potential buyers of  25 the company?</p>
<p style="text-align: right;">Page 175</p> <p>1 A. Yes, I did.  2 Q. And did Houlihan explain that Sun  3 took a walk on this deal?  4 A. Ultimately they did, yes, but  5 no -- there's been no -- there was never --  6 we've never found or I've not seen a document  7 or any explanation as to why there wasn't a  8 counteroffer because --  9 Q. Was there ever -- do you have  10 evidence of an offer being made by Sun Capital  11 for Antioch Company?  12 A. There are e-mails indicating that  13 there were expressions -- that there was an  14 expression of interest.  15 Q. Listen to my question. You're a  16 lawyer -- you're a transaction lawyer?  17 A. Uh-huh. A bankruptcy lawyer.  18 Q. A bankruptcy lawyer. Do you know  19 what an offer is?  20 A. Yes.  21 Q. One of the exhibits you looked at  22 was an offer by J.H. Whitney for the company  23 for fifty-four million dollars, right?  24 A. Letter of intent, yes.  25 Q. Letter of intent. Did Sun</p>	<p style="text-align: right;">Page 177</p> <p>1 A. Uh-huh.  2 Q. Yes?  3 A. Yes. I'm sorry. Yes.  4 Q. And do you rely on this, in part,  5 for your information as to what actions  6 Houlihan Lokey took and what actions potential  7 buyers took?  8 A. It is -- yes, it is certainly some  9 of the information that we have.  10 Q. And isn't it true that Houlihan  11 Lokey explains in this presentation that both  12 Jostens and Sun Capital, upon further  13 investigation of Antioch, decided to take a  14 walk?  15 A. I'm looking for that right now.  16 MS. ANDREW: Objection. I think that  17 misstates the evidence. Take your time to look  18 through the entire document.  19 THE WITNESS: I will do that, yes.  20 BY MR. PRENTISS:  21 Q. You might want to look at internal  22 page -- document control number PCA0004162 and  23 4163.  24 A. Okay. Give me just a moment. 62.  25 Okay. Uh-huh. Uh-huh. Yeah. Why don't you</p>

<p style="text-align: right;">Page 178</p> <p>1 take a look at PCA-004164. HLZ is seeking on  2 October 24th to go back to Sun Capital with  3 counteroffer approved by the committee special  4 transaction -- approved by the company's  5 special transaction committee. HLZ is waiting  6 for -- HLHZ, I'm sorry, is waiting for approval  7 on action items to execute next steps. That's  8 where it ends.</p> <p>9 Q. Let's look at the previous page.  10 Do you read this, on October 24th, 2007, Sun  11 Capital delivered a message that they were not  12 going to be in a position to mark-up a purchase  13 agreement --</p> <p>14 A. Uh-huh.</p> <p>15 Q. -- as they believed their  16 valuation was significantly below what they  17 believe seller expectations were?</p> <p>18 A. Yes. I saw that.</p> <p>19 Q. Do you have any reason to doubt  20 that that's, in fact, what Sun Capital told  21 Houlihan Lokey?</p> <p>22 A. Well, no, I don't; but if you read  23 down the page, it talks about -- let's see.  24 Sun believes they have done a tremendous amount  25 of work on the opportunity and also performed</p>	<p style="text-align: right;">Page 180</p> <p>1 you go back -- again, the decision was made in  2 February to sell. They go through a sale  3 process, and what Houlihan is saying is that  4 the indications of value are coming back  5 because the company's financials and its  6 operations is deteriorating with time, and  7 somebody has come back and said, well, you  8 know, we don't want to -- we don't see doing  9 the deal that you guys have proposed but here's  10 an alternative deal. I think you respond to  11 that if the original decision of the board in  12 February was to sell, and we can't see anywhere  13 where they responded to.</p> <p>14 We do know, though, that they got  15 sidetracked by an offer in the interim here  16 from Lee and Candlewood. And, again, it was an  17 offer with a lot of issues. I use the word  18 offer very loosely. It was an expression of  19 interest I would say.</p> <p>20 Q. Well, do you distinguish between  21 the expression of interest of -- that you're  22 referring to from Mr. Morgan and whatever  23 expression that you believe Sun Capital made?</p> <p>24 A. No. I would put those things in  25 the same ballpark. I think the board</p>
<p style="text-align: right;">Page 179</p> <p>1 independent research, and as such, would  2 potentially be willing to move forward under  3 the following scenario. Senior lenders would  4 need to be willing to rollover the position.  5 Sun would assume approximately what they  6 believe to be unfunded consultant retirement  7 obligations. No cash proceeds with a  8 possibility of some potential subdebt.</p> <p>9 That's a -- we understood to be a  10 verbal proposal, and here is Houlihan saying  11 they've delivered this information to the board  12 and they're looking for board approval or  13 special committee approval to go back to Sun  14 with a counteroffer, and that is consistent  15 with e-mails at that time. And what we don't  16 understand is why that never happened from what  17 we can tell. And if somebody has a document or  18 found a document that answers that question, I  19 would be happy to see it because we don't know  20 what happened from that point.</p> <p>21 Q. So your position is that the board  22 committed a breach of fiduciary duty by not  23 making a counteroffer to Sun?</p> <p>24 A. Yes. I mean, if somebody is out  25 there with an expression of interest, I think</p>	<p style="text-align: right;">Page 181</p> <p>1 should have been responding to that, but Sun --  2 there's no indication -- unlike from  3 Mr. Morgan, there's no indication from Sun that  4 they weren't going to put any money in at least  5 or didn't have an ability to do a deal that  6 involved them putting money in. I guess they  7 don't -- their initial indication was they  8 didn't want to have to put money in, they  9 wanted the banks to roll stuff over; but, you  10 know, these are private equity funds.</p> <p>11 Q. What's the distinction of it being  12 a private equity fund? How does that make a  13 difference over the fact that it doesn't offer  14 any money into the deal?</p> <p>15 A. Well, it's probably a poor  16 distinction, let's leave it at that.</p> <p>17 Q. Elsewhere in your interrogatory  18 answer you talk about -- one of the failings of  19 the board of directors and of Jim Northrop was  20 that it was -- it led the company to jeopardize  21 realistic alternatives for the company and  22 create confusion in the marketplace. Do you  23 remember giving that answer? And this is still  24 on page three.</p> <p>25 A. Let me find it.</p>

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<p>1 Q. Just further down.</p> <p>2 A. We're on page -- I'm terribly</p> <p>3 sorry but I'm not seeing what you're talking</p> <p>4 about. I'm sorry.</p> <p>5 Q. Page three, the first page of your</p> <p>6 answer to interrogatory number one?</p> <p>7 A. Okay. Thank you.</p> <p>8 Q. The special committee, including</p> <p>9 Northrop, approved the engagement of multiple</p> <p>10 professionals -- do you see that?</p> <p>11 A. Yes.</p> <p>12 Q. -- sanctioning the actions of</p> <p>13 multiple professionals thereby jeopardizing</p> <p>14 realistic alternatives. Do you see all that</p> <p>15 answer?</p> <p>16 A. Yes. Uh-huh.</p> <p>17 Q. Okay. First, what did Northrop do</p> <p>18 to sanction the actions of multiple</p> <p>19 professionals?</p> <p>20 A. Well, I think you've got Houlihan</p> <p>21 involved. You've got Candlewood involved and</p> <p>22 looking to get paid from the company. You've</p> <p>23 got legal counsel involved. And all these</p> <p>24 folks are continuing on in a process through</p> <p>25 2008 that I think I just mentioned that when</p>	<p>1 ahead and agrees to give GSC exclusivity, which</p> <p>2 means really the company is dealing exclusively</p> <p>3 with them, putting the company kind of on hold</p> <p>4 for thirty days while GSC does due diligence,</p> <p>5 and then gets toward the end of that due</p> <p>6 diligence period in mid April and GSC backs out</p> <p>7 and the company, you know, is still out there.</p> <p>8 And now at this juncture, and it's</p> <p>9 really not until then that the special</p> <p>10 committee does something significant and</p> <p>11 serious in terms of asking Mr. Morgan to step</p> <p>12 down and bring in, you know, a professional</p> <p>13 turnaround person who has kind of been there in</p> <p>14 the wings all the time but nobody is really</p> <p>15 using in favor of keeping Mr. Morgan in place.</p> <p>16 And, again, Mr. Morgan is -- and</p> <p>17 the Morgan family are the ones who have kind of</p> <p>18 presided over the company getting to the place</p> <p>19 that it is. And --</p> <p>20 Q. But -- my question was, what did</p> <p>21 Northrop do to sanction the actions of multiple</p> <p>22 professionals? Your answer is that he and the</p> <p>23 members of the special transaction committee</p> <p>24 looked at proposals submitted by Candlewood or</p> <p>25 the Morgan family, correct?</p>
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<p>1 you have -- as I said, there were three</p> <p>2 parties -- pardon me -- in the March time</p> <p>3 frame -- March to April time frame coming</p> <p>4 forward with offers to purchase the company in</p> <p>5 a change of control transaction -- pardon me --</p> <p>6 that would be done through a bankruptcy; and</p> <p>7 instead of pursuing any of those really in any</p> <p>8 earnest until probably, from what I could tell,</p> <p>9 mid to late April, the special committee is</p> <p>10 entertaining offers from Candlewood first as an</p> <p>11 Article 9 sale, which doesn't make any sense</p> <p>12 whatsoever in this circumstance and Houlihan</p> <p>13 does a very good job -- there's a very lengthy</p> <p>14 e-mail from Houlihan that explains why that's a</p> <p>15 really bad idea.</p> <p>16 And then there is -- they go back</p> <p>17 to the drawing board and there's something</p> <p>18 else, I think, in February that ultimately</p> <p>19 becomes maybe the GSC deal, and Houlihan again</p> <p>20 raises questions and issues with that and the</p> <p>21 ability to get it done. And, in fact, Houlihan</p> <p>22 is telling -- I think is telling the special</p> <p>23 committee that they have real concerns about</p> <p>24 GSC and how real this is.</p> <p>25 But the special committee goes</p>	<p>1 MS. ANDREW: Objection.</p> <p>2 THE WITNESS: Well, they entertained</p> <p>3 those proposals and they did that to the exclusion</p> <p>4 of other proposals.</p> <p>5 BY MR. PRENTISS:</p> <p>6 Q. How do you know it was to the</p> <p>7 exclusion of other proposals?</p> <p>8 A. Because they weren't proceeding</p> <p>9 with the other proposals.</p> <p>10 Q. Marlin -- are you talking about</p> <p>11 Marlin Equity?</p> <p>12 A. Marlin and Whitney and Monomoy --</p> <p>13 Q. Okay.</p> <p>14 A. -- right?</p> <p>15 Q. Well, let me ask you about Marlin.</p> <p>16 How much of an offer did Marlin make?</p> <p>17 A. I'd have to look back at the</p> <p>18 documents, but my recollection was one of them</p> <p>19 was in the forty-some millions.</p> <p>20 Q. So is it your testimony that the</p> <p>21 board should have executed a sale with Marlin</p> <p>22 at forty million dollars?</p> <p>23 A. No, that's not my testimony.</p> <p>24 Q. Is that the realistic alternative</p> <p>25 that you say that the board was jeopardizing in</p>

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<p>1 this answer, the Marlin Equity deal?</p> <p>2 A. No. I think what ultimately came</p> <p>3 out of the process, and the process was delayed</p> <p>4 at least thirty days, if not more, was the J.H.</p> <p>5 Whitney offer that they were moving forward to</p> <p>6 in May that was at, my recollection, fifty-four</p> <p>7 or fifty-two million, somewhere in there, for a</p> <p>8 363 sale process and bankruptcy.</p> <p>9 Q. Was the Marlin Equity deal one of</p> <p>10 the deals you refer to when you say that</p> <p>11 Northrop jeopardized realistic alternatives for</p> <p>12 the company? Yes or no?</p> <p>13 A. Yes.</p> <p>14 Q. What other specific offers --</p> <p>15 A. Well --</p> <p>16 Q. -- do you refer to as being</p> <p>17 realistic alternatives that Northrop</p> <p>18 jeopardized?</p> <p>19 A. I think from the -- from what</p> <p>20 unfolded, as I understood it, by May, there</p> <p>21 were at least three different offers, Monomoy,</p> <p>22 Marlin, and Whitney, and the company was at</p> <p>23 that time proceeding, purportedly, for a</p> <p>24 deal -- a 363 deal with Whitney.</p> <p>25 And, again, one of the things that</p>	<p>1 A. My recollection is that there is</p> <p>2 e-mail traffic on it somewhere that -- but I'd</p> <p>3 have to go back and look. There are too -- I</p> <p>4 mean --</p> <p>5 Q. Well, this is important so why</p> <p>6 don't we go --</p> <p>7 A. I understand.</p> <p>8 Q. -- off the record and you find the</p> <p>9 e-mails. And so that we're very clear on the</p> <p>10 record what I'm asking for, I'm asking you to</p> <p>11 identify a single or multiple entities --</p> <p>12 A. Uh-huh.</p> <p>13 Q. -- that declined to be involved in</p> <p>14 purchase of The Antioch Company because it or</p> <p>15 they were confused by the actions of the board</p> <p>16 of directors of Antioch. Do you understand</p> <p>17 that?</p> <p>18 A. I do.</p> <p>19 Q. Fine. Let's go off the record and</p> <p>20 see what you can find.</p> <p>21 A. Okay.</p> <p>22 THE VIDEOGRAPHER: We're off the</p> <p>23 record.</p> <p>24 (Pause in proceedings.)</p> <p>25 THE VIDEOGRAPHER: We're on the</p>
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<p>1 seems to be missing here is that you're not</p> <p>2 talking about doing the deal at that offer.</p> <p>3 You're talking about doing the deal in a 363</p> <p>4 sale in a bankruptcy, and that offer is the</p> <p>5 starting place for the other offers because a</p> <p>6 363 sale is an auction and you've got three</p> <p>7 parties vying to be the entity that starts the</p> <p>8 auction.</p> <p>9 So we don't know how much somebody</p> <p>10 would have paid at the auction because it never</p> <p>11 happened. It never got started.</p> <p>12 Q. Is this true, Mr. Miller: When</p> <p>13 you say that the board's actions caused or</p> <p>14 created confusion in the marketplace, you could</p> <p>15 not identify a single potential buyer which</p> <p>16 either backed out of engaging in a possible</p> <p>17 sale or declined to get involved in a possible</p> <p>18 purchase of the company because of confusion?</p> <p>19 A. I don't know that that's -- I</p> <p>20 don't know that that's accurate, but --</p> <p>21 Q. Well, then, identify the actor,</p> <p>22 the potential buyer that backed away from being</p> <p>23 involved in this process because it was</p> <p>24 confused by the actions of the board of</p> <p>25 directors.</p>	<p>1 record.</p> <p>2 BY MR. PRENTISS:</p> <p>3 Q. Mr. Miller, have you identified a</p> <p>4 potential buyer that either backed out of or</p> <p>5 declined to get involved in possible purchase</p> <p>6 of The Antioch Company because it was confused</p> <p>7 by the actions of the Antioch board of</p> <p>8 directors?</p> <p>9 A. No, but I have identified a</p> <p>10 document indicating a confusion among the</p> <p>11 bidders.</p> <p>12 Q. That wasn't my question.</p> <p>13 A. Okay.</p> <p>14 Q. Thank you.</p> <p>15 A. As I sit here today, no, I have</p> <p>16 not, that backed away.</p> <p>17 Q. Now, in further answers -- your</p> <p>18 answers to interrogatories, I'm going to ask</p> <p>19 you to turn back to your answer to the question</p> <p>20 involving damages, interrogatory number</p> <p>21 fourteen and your answer beginning at page --</p> <p>22 page fifteen.</p> <p>23 And I'm specifically going to ask</p> <p>24 you questions about the topic that begins in</p> <p>25 boldface below the half of the page on page</p>



<p style="text-align: right;">Page 190</p> <p>1 sixteen, loss in enterprise value.</p> <p>2 A. Uh-huh.</p> <p>3 Q. Do you see that?</p> <p>4 A. Yes.</p> <p>5 Q. That's your answer talking about</p> <p>6 an element of damages that you claim in this</p> <p>7 case?</p> <p>8 A. Yes.</p> <p>9 Q. And is it true that the loss of</p> <p>10 enterprise value that you're claiming as</p> <p>11 damages resulted both, in your opinion, from</p> <p>12 the tender offer and the sale process?</p> <p>13 A. That's what -- yes, that's what</p> <p>14 the answer says. Yes.</p> <p>15 Q. And the sale process is the</p> <p>16 process that I've been asking you questions</p> <p>17 about that took place during 2007 and 2008,</p> <p>18 correct?</p> <p>19 A. Correct.</p> <p>20 Q. The tender offer is the 2003 ESOP</p> <p>21 transaction?</p> <p>22 A. That is correct.</p> <p>23 Q. And you can't differentiate or</p> <p>24 apportion what you call loss in enterprise</p> <p>25 value damages between those two causes, can</p>	<p style="text-align: right;">Page 192</p> <p>1 So there are three points in time.</p> <p>2 There's a value at the time of the tender</p> <p>3 offer, there's expressions of interest in the</p> <p>4 summer, and then there are -- then there's a</p> <p>5 value -- then there's a J.H. Whitney offer, and</p> <p>6 those are decreases at each point in time.</p> <p>7 So -- and, again, it's all subject to having an</p> <p>8 expert really weigh in on that and provide</p> <p>9 greater specificity, detail, et cetera.</p> <p>10 Q. Well, your figure of a hundred and</p> <p>11 twenty-one million then, that's a number you</p> <p>12 blame on my guy, Jim Northrop?</p> <p>13 A. Basically.</p> <p>14 Q. Okay. Now, let's start with</p> <p>15 the -- your fifty-four million dollar figure.</p> <p>16 Is it the Trust's position that the enterprise</p> <p>17 value of Antioch in May of 2008 was fifty-four</p> <p>18 million dollars?</p> <p>19 A. Again, we don't have a testifying</p> <p>20 expert with respect to this; but there was an</p> <p>21 offer by J.H. Whitney of fifty-four million</p> <p>22 dollars in May and the company was proceeding</p> <p>23 forward to move forward on that with a 363</p> <p>24 sale.</p> <p>25 As I indicated earlier, a 363 sale</p>
<p style="text-align: right;">Page 191</p> <p>1 you?</p> <p>2 A. Well, no, it's saying that we are</p> <p>3 expecting to offer expert testimony on the loss</p> <p>4 of enterprise that resulted from the tender</p> <p>5 offer process and the sale process. That's</p> <p>6 what it says.</p> <p>7 Q. Well -- but you go on in your</p> <p>8 answer to actually give some figures --</p> <p>9 A. Yeah.</p> <p>10 Q. -- on what you claim as being loss</p> <p>11 of enterprise value, right?</p> <p>12 A. And those come from -- at least</p> <p>13 the figures come from the sale process, right?</p> <p>14 Q. Well, I'm asking you. The figures</p> <p>15 you've got here for loss of enterprise value,</p> <p>16 are those figures that you attribute both to</p> <p>17 the tender offer and the sale process?</p> <p>18 A. I think that you would logically</p> <p>19 look at it from a standpoint of the company has</p> <p>20 a value at the time of the tender offer, okay,</p> <p>21 and in the summer of '07 what this is saying,</p> <p>22 there are expressions of interest that put the</p> <p>23 value between one forty-eight and one</p> <p>24 eighty-five. And then by May of 2008 you have</p> <p>25 a J.H. Whitney offer at fifty-four million.</p>	<p style="text-align: right;">Page 193</p> <p>1 is an auction process. So fifty-four million</p> <p>2 is the starting place. We do not know, and as</p> <p>3 we sit here today, do not know what the value</p> <p>4 might have been had an auction occurred.</p> <p>5 Q. Well, is it the position of the</p> <p>6 Trust -- I mean, you signed these answers,</p> <p>7 correct?</p> <p>8 A. Yes.</p> <p>9 Q. These are the answers of the</p> <p>10 Trust, correct?</p> <p>11 A. Yes, and --</p> <p>12 Q. These are the answers of you as</p> <p>13 the trustee, the plaintiff in this lawsuit?</p> <p>14 A. On behalf of the Trust in August</p> <p>15 of 2011, yes.</p> <p>16 Q. All right. And it's the position</p> <p>17 of the trust that the value of -- the</p> <p>18 enterprise value of the company, Antioch</p> <p>19 Company, was at least fifty-four million as of</p> <p>20 May 2008?</p> <p>21 A. The company's value had declined</p> <p>22 to approximately fifty-four million --</p> <p>23 Q. So --</p> <p>24 A. -- based on that offer.</p> <p>25 Q. -- the answer is yes?</p>

<p style="text-align: right;">Page 194</p> <p>1 A. Based on the offer. That's --</p> <p>2 that's the only offer that -- I mean, that was</p> <p>3 what was out there in terms of the best offer</p> <p>4 in May of 2008.</p> <p>5 Q. That's a benchmark?</p> <p>6 A. It's what somebody was willing to</p> <p>7 sign off and be a stocking horse in an auction</p> <p>8 pursuant to an LOI, although they had not</p> <p>9 reached -- there was not definitive terms of an</p> <p>10 agreement at that juncture. That was a letter</p> <p>11 of intent.</p> <p>12 Q. But there was sufficient evidence</p> <p>13 in your mind to be able to say the value of the</p> <p>14 company was at least fifty-four million dollars</p> <p>15 in May 2008 because there was a letter of</p> <p>16 intent, arm's length transaction --</p> <p>17 A. Again, we say --</p> <p>18 Q. -- offer?</p> <p>19 A. -- by May the company's value had</p> <p>20 declined based on that proposal.</p> <p>21 Q. Now --</p> <p>22 A. I don't -- yeah.</p> <p>23 Q. Okay. Now, let's -- so that's the</p> <p>24 basis of the fifty-four million dollar figure.</p> <p>25 Go back a page to your discussion of Jostens</p>	<p style="text-align: right;">Page 196</p> <p>1 was the one he handed me.</p> <p>2 Q. Yeah, you should have it.</p> <p>3 MR. SCHEIER: Isn't this it?</p> <p>4 THE WITNESS: Yes, you may be right.</p> <p>5 I just didn't flip far enough. Sorry. Thank you.</p> <p>6 MS. ANDREW: It was masquerading as</p> <p>7 an e-mail.</p> <p>8 THE WITNESS: Yeah. Yeah, these were</p> <p>9 the references to the initial letters on</p> <p>10 PCA-00041363, four times to five times sustainable</p> <p>11 run rate EBITDA to Sun Capital.</p> <p>12 BY MR. PRENTISS:</p> <p>13 Q. Tell me what -- you gave me a</p> <p>14 number that doesn't --</p> <p>15 A. 416 -- PCA-4163.</p> <p>16 Q. Okay.</p> <p>17 A. Page eighteen is at the top. Sun</p> <p>18 Capital outlined a valuation in their initial</p> <p>19 bid letter four times to five times sustainable</p> <p>20 run rate EBITDA.</p> <p>21 Let's see, what does Jostens say?</p> <p>22 Let's see.</p> <p>23 Q. Well, let's just stay with the Sun</p> <p>24 Capital.</p> <p>25 A. Well, I'll tell you I think it's</p>
<p style="text-align: right;">Page 195</p> <p>1 and Sun Capital.</p> <p>2 A. Uh-huh.</p> <p>3 Q. Do you see that?</p> <p>4 A. Yes.</p> <p>5 Q. Are you meaning to imply with this</p> <p>6 answer that Jostens and Sun Capital made</p> <p>7 expressions that they or either of them valued</p> <p>8 The Antioch Company at between a hundred and</p> <p>9 forty-eight and a hundred and eighty-five</p> <p>10 million dollars?</p> <p>11 A. I understood -- I mean, I think</p> <p>12 that there are documents from -- or reports</p> <p>13 from Houlihan with respect to Jostens and Sun</p> <p>14 Capital placing expressions of interest of the</p> <p>15 four to five times EBITDA. In fact, I think</p> <p>16 that exhibit we just looked at may have</p> <p>17 mentioned that.</p> <p>18 Q. Well, why don't you just pick that</p> <p>19 up and you show me within Exhibit 183 or</p> <p>20 anyplace else where Houlihan communicates that</p> <p>21 either Jostens or Sun Capital valued The</p> <p>22 Antioch Company at between a hundred and</p> <p>23 forty-eight and a hundred and eighty-five</p> <p>24 million dollars.</p> <p>25 A. I don't see the exhibit here. It</p>	<p style="text-align: right;">Page 197</p> <p>1 probably in the August 30th portion because</p> <p>2 they submitted those expressions of interest in</p> <p>3 the summer, and I think EBITDA then</p> <p>4 subsequently goes down. But I think that this</p> <p>5 document or something similar to it may be --</p> <p>6 well be where those numbers came from.</p> <p>7 Q. Well, sustainable run rate</p> <p>8 EBITDA --</p> <p>9 A. Uh-huh.</p> <p>10 Q. -- means an EBITDA level that can</p> <p>11 reliably be expected to continue into the</p> <p>12 future, right?</p> <p>13 A. That would be my understanding of</p> <p>14 that, yeah.</p> <p>15 Q. And did anybody ever as -- in this</p> <p>16 Houlihan document or elsewhere, say that</p> <p>17 Antioch in the summer of 2007 had a sustainable</p> <p>18 run rate EBITDA of thirty-seven million</p> <p>19 dollars?</p> <p>20 A. Well, I imagine at the -- no, I</p> <p>21 mean, clearly that was decreasing with time.</p> <p>22 Although when people became aware of that, you</p> <p>23 know, is another question.</p> <p>24 If you look back on -- here's a</p> <p>25 comparison of the two offers -- or the</p>

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<p>1 expressions -- indications of interest on page 2 thirty-four of that exhibit at 4179, and 3 that's -- there's a thirty-seven million dollar 4 EBITDA number there with four and five times. 5 And, again -- 6 Q. This is far from an evaluation of 7 the enterprise value of a corporation, an 8 initial indication of interest, correct? 9 A. Yeah, it's an expression of 10 interest. Yes, that's absolutely right. Yes. 11 Absolutely. 12 MR. PRENTISS: Thanks. I have 13 nothing further. 14 MS. BRENNAN: I can start if no one 15 has any objection to me starting. I might even 16 get through in a half hour. 17 MR. GENTRY: That's fine. 18 MS. BRENNAN: Okay. We're going to 19 go ahead though and change the tape right now 20 since there's only five minutes left. 21 THE VIDEOGRAPHER: We're off the 22 record. 23 (Pause in proceedings.) 24 THE VIDEOGRAPHER: We're on the 25 record.</p>	<p>1 of me, however, is Exhibit 241, which is an 2 e-mail from Glenn Pollack to Lee Morgan dated 3 6-28-07. 4 Q. Okay. And in preparation for 5 today's deposition, you testified that you 6 reviewed the deposition exhibits; is that 7 correct? 8 A. Yes. 9 Q. And you also testified that you 10 reviewed portions of deposition transcripts; 11 but if I understood your testimony, you didn't 12 read every deposition transcript that has been 13 taken in this case; is that correct? 14 A. That is correct. 15 Q. When you were reviewing deposition 16 exhibits, did you also review the deposition 17 testimony that related to that exhibit? 18 A. Yes. With certain exhibits, yes. 19 Yes. 20 Q. Not with every exhibit? 21 A. Not with every exhibit, no. 22 Q. Okay. Do you recall what exhibits 23 you also looked back at the deposition 24 testimony? 25 A. Not as I sit -- no. I mean, not</p>
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<p>1 CROSS-EXAMINATION 2 BY MS. BRENNAN: 3 Q. Mr. Miller, my name is Kimberly 4 Brennan. I represent Candlewood Partners in 5 this matter. I'm going to be asking you some 6 questions regarding the allegations that the 7 Trust has made against my client. 8 Before I begin, I see that you 9 have a binder full of documents -- 10 A. Yes. 11 Q. -- in front of you. Are those 12 documents that relate to Candlewood Partners? 13 A. There are some in here, yes, to 14 that effect. Yes. 15 Q. And would you identify the 16 specific exhibits that you are relying upon? 17 A. This -- these are deposition 18 exhibits. I think it's pretty much everything 19 but just in chronological order. I don't think 20 -- these aren't just specific to Candlewood. 21 But I guess I may or may not need to rely on 22 them depending on what your questions are, I 23 just wanted to have it ready to try to minimize 24 any time delay if I -- if I needed to look at 25 something. The document that is open in front</p>	<p>1 as I sit here. I mean -- 2 Q. Did you review the deposition 3 transcript of Mr. Glenn Pollack? 4 A. I'm thinking that I may have with 5 respect to certain exhibits but I don't 6 precisely recall which ones. I apologize but 7 there are enough of them that it -- to some 8 extent it kind of runs together in my head, but 9 I don't have a firm recollection of having 10 reviewed his depo exhibit. 11 Q. Okay. Or his transcript? 12 A. I'm sorry, the exhibits 13 definitely. I definitely reviewed the 14 exhibits. The transcripts, I can't recall for 15 certain that I -- yeah, I just don't remember. 16 Q. Okay. Did you review the 17 deposition transcript of Stephen Spencer from 18 Houlihan Lokey? 19 A. I believe I reviewed portions of 20 that with respect to certain exhibits. 21 Q. Do you recall what portions you 22 reviewed? 23 A. I don't. 24 Q. Okay. I want to go back to the 25 preparation that the Trust undertook prior to</p>

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1 filing both the original complaint and the  
2 amended complaint. Was there any type of  
3 informal interview process that was done prior  
4 to filing the complaint? For example, did  
5 either you or anyone associated with the Trust  
6 conduct informal interviews with people who  
7 were either currently employed by The Antioch  
8 Company or had been employed by The Antioch  
9 Company prior to the filing of the bankruptcy?

10 A. I don't believe that we conducted  
11 informal interviews of anyone. During the  
12 bankruptcy case itself the committee was  
13 permitted to take -- I don't know what the best  
14 word to call them. They were not depositions.  
15 Maybe they were, at best, informal interviews.  
16 There were no transcriptions from that. But  
17 that was done, you know, in connection with the  
18 committee's investigating and, you know,  
19 basically formulating a response to the  
20 proposed plan of reorganization that was going  
21 through the bankruptcy at a very fast pace at  
22 that time.

23 Q. And when you refer to the  
24 committee, you are referring to the official  
25 committee of the unsecured creditors?

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1 A. Correct.

2 Q. Okay. And do you recall who was,  
3 for lack of a better word, interviewed by the  
4 committee?

5 A. Not everyone, but I'm pretty  
6 certain that Asha Morgan Moran was interviewed.  
7 Michael Epstein, I think, was interviewed. I  
8 think Lee Morgan was interviewed. I know that  
9 there were others, but off the top of my head,  
10 I don't recall precisely who all was  
11 interviewed.

12 Q. Do you remember if anyone from  
13 Candlewood Partners was interviewed during the  
14 bankruptcy?

15 A. I do not remember if they were,  
16 and I'm not aware that they -- I mean, I don't  
17 remember that they were, and I don't know --  
18 given what was going on in the bankruptcy at  
19 the time, I don't know that they would have  
20 been somebody that would have been interviewed  
21 at that time.

22 Q. Do you know whether or not anyone  
23 from Houlihan Lokey was interviewed at that  
24 time?

25 A. Again, I don't recall

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1 specifically; but I don't think -- think so.  
2 There were a limited number of people that were  
3 made available over a limited period of time  
4 because time was very short.

5 Q. Okay. And prior to the filing of  
6 the complaint, were documents reviewed?

7 A. Yes.

8 Q. And were those documents from The  
9 Antioch Company itself or were they documents  
10 from outside sources?

11 A. There were documents from The  
12 Antioch Company itself. There were documents  
13 from outside sources as well. So, yes, both.

14 Q. Okay. And, in fact, the Trust  
15 served subpoenas on various entities, including  
16 Candlewood Partners; is that correct?

17 A. My recollection is that we asked  
18 for authority from the bankruptcy court to do  
19 2004 exams, and that the bankruptcy court  
20 declined to give us that authority and instead  
21 asked that we go ask informally and then come  
22 back to the court if there was an issue. All  
23 of this would be in the docket of the  
24 bankruptcy case. And this would have been in  
25 the summer of 2009 time frame.

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1 Q. Okay.

2 A. So, again, whether or not that  
3 resulted in a subpoena to Candlewood, I  
4 honestly don't recall sitting here today.

5 Q. Okay. In the first amended  
6 complaint, which I believe you have in front of  
7 you as Exhibit 42, there are some very specific  
8 factual allegations, and I'm going to direct  
9 your attention to Paragraph 117.

10 And if you look at the second  
11 sentence of that paragraph, it reads defendant  
12 Houlihan and defendant Candlewood thought the  
13 other professional's work interfered with and  
14 jeopardized the potential for a successful  
15 outcome for the company, period. Did I read  
16 that sentence accurately?

17 A. Yes.

18 Q. And can you tell me the factual  
19 basis for that statement?

20 A. I think that there are e-mails  
21 where we have Mr. Pollack from Candlewood  
22 essentially complaining about the Houlihan  
23 people. One I'm thinking in particular is the  
24 GSC meeting -- the management presentation to  
25 GSC that's to take place in New York, I

52 (Pages 202 to 205)

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1 believe, sometime in February of 2008 where Mr.  
2 Pollack is talking about, you know, being  
3 certainly unhappy that Houlihan is involved and  
4 wanting to be involved in that process and  
5 saying something about having Mr. Spencer sit  
6 down and sit in the corner and be quiet is my  
7 recollection of that, but that could be wrong.  
8 But there is -- that's an example.

9 And then I know there are  
10 e-mails -- or there's at least an e-mail from  
11 Mr. Spencer expressing doubts about  
12 Candlewood's ability to get to a deal I think  
13 in that same time frame, and maybe it's with  
14 respect to GSC but it may also be with respect  
15 to something earlier. I'd have to look back  
16 and see those e-mails, but that's what comes  
17 immediately to mind.

18 Q. Assuming for purposes of my  
19 question that there may have been personality  
20 conflicts between Mr. Spencer and Mr. Pollack,  
21 I will represent to you that there has been  
22 ample testimony in this case so far that  
23 Houlihan and Candlewood actually worked  
24 together and that neither interfered with the  
25 other's ability to do the role it had been

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1 assigned. Do you have any facts -- does the  
2 Trust have any facts as we sit here today that  
3 would contradict that testimony?

4 A. Well, the e-mails that I just  
5 mentioned.

6 There is -- I can think of an  
7 e-mail exchange I believe in the April time  
8 frame -- I think it's April time frame where  
9 Mr. Morgan is looking to get financial  
10 information I think for Candlewood to use from  
11 Mr. Bevelhymmer with the company and  
12 Mr. Bevelhymmer is, I believe, busy trying to  
13 get information for Houlihan, and I think  
14 Mr. Morgan expresses some frustration about  
15 that.

16 There are other e-mails, I think,  
17 where there is -- there are some issues there  
18 as between the two, you know, parties not --  
19 initially not cooperating.

20 In fact, there's some amount of  
21 discussion in the January time frame about --  
22 in response to Mr. Morgan's letter on January  
23 2nd, I believe it is, of '08, you know, wanting  
24 to get Houlihan and Candlewood to cooperate  
25 more because they hadn't been up until that

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1 point.

2 Q. And are you aware that Mr. Spencer  
3 testified that although there were issues in  
4 the beginning as to what the scope -- the  
5 division of scope was going to be, that  
6 Candlewood and Houlihan actually worked out  
7 their differences and ended up working in  
8 collaboration? Are you aware that he testified  
9 to that effect?

10 A. I wouldn't -- I don't recall  
11 seeing that testimony; but if he did at this  
12 juncture, I -- okay.

13 Q. And would you agree with me that  
14 Mr. Spencer from Houlihan would probably be in  
15 the best position to make a determination as to  
16 whether or not Candlewood's actions interfered  
17 with the process Houlihan was attempting to  
18 undertake?

19 A. Well, it strikes me that the  
20 contemporaneous written back-and-forth that was  
21 going on at the time the transaction was going  
22 on as between Houlihan and Candlewood and what  
23 one was saying about the other or doing with  
24 respect to the other is probably better  
25 evidence of what was going on at that time, in

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1 my view, than some, you know -- a testimony a  
2 few years subsequent is, I guess, my view.

3 Q. If I understood your response just  
4 now, you're discounting the testimony that  
5 Mr. Spencer gave under oath in his deposition  
6 in favor of e-mails he may have written out of  
7 frustration during a very complicated process  
8 and a very pressured-filled process?

9 A. Yes.

10 Q. Okay. Is it the Trust's position  
11 that the dual process undertaken by Houlihan  
12 and Candlewood was harmful to The Antioch  
13 Company?

14 A. Yes.

15 Q. And why was it harmful to The  
16 Antioch Company?

17 A. Well, you heard me testify  
18 earlier, for example, about the Sun expression  
19 of interest in the February time frame to which  
20 there was ultimately no response, from what we  
21 could tell, from the company coming back  
22 despite Houlihan having requested it several  
23 times.

24 And really the only thing, you  
25 know, that changed the mix at that juncture,



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<p>1 beyond where that expression of interest was</p> <p>2 at, was a proposal interposed by Candlewood and</p> <p>3 Mr. Morgan at about that same time.</p> <p>4 And, again, it's some of what I've</p> <p>5 already talked about, I think, in connection</p> <p>6 with the questions from Mr. Prentiss.</p> <p>7 Q. Let me interrupt you just --</p> <p>8 A. Okay.</p> <p>9 Q. -- because I'm going to follow up</p> <p>10 on an answer you actually gave Mr. Prentiss. I</p> <p>11 believe you testified that the Sun expression</p> <p>12 of interest disappeared because of the Lee</p> <p>13 Morgan/Candlewood proposal in November of 2007.</p> <p>14 Did I understand your testimony correctly?</p> <p>15 A. I think that looking at the</p> <p>16 documents and the timing of everything, what we</p> <p>17 can see is those expressions of interest are</p> <p>18 there and the Lee Candlewood proposal is there</p> <p>19 and we don't see any sort of response to the</p> <p>20 Sun expression of interest despite requests of</p> <p>21 Houlihan, and I think that there are other</p> <p>22 e-mails that talk about needing to do that</p> <p>23 request -- or I'm sorry, respond to the Sun</p> <p>24 expression of interest in that same time frame.</p> <p>25 So those two things do occur in</p>	<p>1 Q. How about Jostens?</p> <p>2 A. No.</p> <p>3 Q. Is it the Trust's position that it</p> <p>4 was inappropriate for Mr. Morgan to retain</p> <p>5 Candlewood Partners?</p> <p>6 A. Well, as president and CEO of a</p> <p>7 corporation that had previously decided that it</p> <p>8 should enter into a sale process for the</p> <p>9 corporation in February, hired an investment</p> <p>10 banking firm to do that in March, and then</p> <p>11 proceeded to go down that road, albeit, you</p> <p>12 know, it seemed to take a while, yes, I don't</p> <p>13 understand why, again, if -- unless he was</p> <p>14 contemplating, you know, interposing his own</p> <p>15 bid for the company which -- but -- and while</p> <p>16 there were expressions of interest made</p> <p>17 beginning in November and there were then other</p> <p>18 things made, it wasn't a sale transaction. It</p> <p>19 was a transaction that it was contrary to what</p> <p>20 the board had previously decided in February</p> <p>21 and it was a transaction that, you know, again,</p> <p>22 not only could they not find financing to do it</p> <p>23 outside of bankruptcy, there were huge issues</p> <p>24 as to whether or not even if they were able to</p> <p>25 find the financing, the rest of it could be</p>
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<p>1 fairly close proximity to one another, but</p> <p>2 that's my -- we don't know why there wasn't a</p> <p>3 response to Sun. We just know that there</p> <p>4 wasn't one.</p> <p>5 Q. Earlier you testified about the</p> <p>6 GSC proposal that was brought by Candlewood and</p> <p>7 the fact that GSC received a period of</p> <p>8 exclusivity.</p> <p>9 A. Yes.</p> <p>10 Q. Do you recall that testimony?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. And were you aware that the</p> <p>13 senior lenders approved granting GSC</p> <p>14 exclusivity?</p> <p>15 A. I saw an e-mail to that effect.</p> <p>16 That e-mail was not from the senior lenders, I</p> <p>17 don't believe, but I did see an e-mail to that</p> <p>18 effect. I don't recall precisely who the</p> <p>19 author of that e-mail was.</p> <p>20 Q. Okay. Has the Trust spoken with</p> <p>21 any representatives of the senior lenders?</p> <p>22 A. No.</p> <p>23 Q. Has the Trust spoken with anyone</p> <p>24 from Sun Capital as to why they disappeared?</p> <p>25 A. No.</p>	<p>1 done out of bankruptcy or how it would be done,</p> <p>2 and that was never really adequately fleshed</p> <p>3 out.</p> <p>4 Q. And is it your position that the</p> <p>5 company shouldn't have pursued a dual track,</p> <p>6 the sale of the company that was being</p> <p>7 addressed by Houlihan and a recapitalization</p> <p>8 that was being addressed by Mr. Morgan with</p> <p>9 funds out of Mr. -- certainly funds for his own</p> <p>10 investment banker coming out of his own pocket?</p> <p>11 Is it your testimony that the Trust believed</p> <p>12 that that dual process should not have</p> <p>13 occurred?</p> <p>14 A. Correct. That the company made a</p> <p>15 decision to sell and was proceeding in that</p> <p>16 way, and Candlewood -- and they have an</p> <p>17 exclusive financial advisor, investment banker</p> <p>18 to do that with knowledge and in violation of</p> <p>19 that exclusivity, you know, Candlewood is</p> <p>20 coming in to essentially run a different</p> <p>21 process at the same time that the company was</p> <p>22 supposedly running a sale process, yes, the</p> <p>23 Trust's position is that they shouldn't be</p> <p>24 running a dual process that had two different</p> <p>25 end objectives. One was leaving existing</p>

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<p>1 management in place, the same management that 2 had gotten the company in the place that it was 3 at, and the other being a change in control 4 with, you know, new ownership, new money coming 5 in to do something with the company. 6 Q. In your experience, is it unusual 7 for a company that is in the position that The 8 Antioch Company found itself in 2007, 2008 to 9 run a dual track process? 10 A. With two separate advisors doing 11 two separate things, yes. 12 Q. So if I understand your testimony, 13 if the company had engaged Houlihan to run two 14 separate tracks, that would have been 15 acceptable to the Trust? 16 A. It would have been less 17 problematic in the sense that one of the issues 18 with having two separate advisors is that each 19 of them are looking for getting a percentage 20 fee typically in that type of transaction from 21 anybody who comes in and buys the company 22 because they're out marketing the company. 23 Exclusivity is a key consideration. 24 There's an e-mail somewhere to 25 Mr. Morgan, and I forget who authors it, early</p>	<p>1 George Case from Marlin expressed his concern 2 there was -- both Marlin and Whitney expressed 3 interest and made -- I'm sorry -- issued -- 4 made expressions of interest and, in fact, a 5 second bid was received by Marlin in May with a 6 higher cash purchase price than its original 7 bid? 8 A. I'm aware that there was continued 9 interest in the company, yeah. 10 Q. So obviously the confusion didn't 11 stop Marlin from being interested in the 12 company? 13 A. Apparently not, no. 14 Q. Mr. Miller, I have almost 4:30 on 15 the dot, and it's my understanding that you 16 need to stop at 4:30; is that correct? 17 A. I believe my counsel -- yes, I 18 believe we do. 19 MS. ANDREW: Kim, I don't know how 20 much more you think you have. I mean, if you 21 think you'll be done in ten or fifteen minutes, we 22 could continue. 23 MS. BRENNAN: I actually do. 24 MS. ANDREW: If it's much more than 25 that, I'd like to stop now.</p>
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<p>1 on before he engages Candlewood, at the time 2 they're talking about engaging Houlihan 3 where -- where the author is explaining to 4 Mr. Morgan the exclusivity piece of it and how 5 once you get them engaged, you're probably 6 going to be -- you know, you want to be certain 7 that this is who you want because once you get 8 them engaged, they're exclusive, they're going 9 to be the ones that are going to work for you 10 on the go-forward because of the exclusivity. 11 You have then -- you don't have 12 exclusivity, you have them competing with 13 respect to buyers so you see the situation that 14 actually unfolded here which was in January, 15 Houlihan is being asked to not go out in the 16 market and market to certain people but 17 Candlewood is. 18 And then we have confusion in the 19 marketplace, there's an e-mail from Marlin in 20 April talking about who's running the process 21 basically and we feel like we're being played 22 and are you really selling or are we just 23 trying to get value up, you know, while the 24 family goes and takes the company? 25 Q. Are you aware that the day after</p>	<p>1 MS. BRENNAN: No, I actually am 2 also -- I'm pretty close to being done. 3 MS. ANDREW: Okay. Well, let's just 4 keep going. But thank you for checking. 5 BY MS. BRENNAN: 6 Q. Are you aware of any facts to 7 support the allegation that Candlewood 8 improperly participated in meetings of the 9 special transaction committee? 10 A. Well, again, I think this goes to 11 an issue with the board that to the extent they 12 permitted that involvement, that, you know, the 13 board chose a course of action in February 14 of '07 to sell the company, they start down 15 that road, they incur that cost, they have 16 Houlihan involved, they go out to the market 17 and run a process, they don't like where the 18 valuations are coming back, and right when the 19 valuations aren't coming back where they want, 20 Candlewood and Mr. Morgan submit a proposal and 21 that -- again, we don't know precisely but Sun 22 goes away. 23 In January, Mr. Morgan makes a big 24 issue with the special committee about not 25 wanting to compromise his debt, not feeling</p>

<p style="text-align: right;">Page 218</p> <p>1 like he's been involved enough, wanting to be  2 part of the special committee meetings, and the  3 special committee permits him to do that.  4 And then, you know, what ensues is  5 more, you know, we're not getting to a sale.  6 You know, there's more -- there's more delay,  7 there's more -- and all the time, you know, the  8 company is -- you know, is delaying the process  9 and we're never getting to a sale process, and  10 we ultimately never do get to a sale process.  11 So, you know, participation of  12 Candlewood, you know, on behalf of Mr. Morgan  13 who is not -- who is looking out for Mr. Morgan  14 in that instance, in the Trust view, and not  15 looking out for the best interest of the  16 company is not productive and we think, you  17 know, is aiding -- is assisting in that breach  18 of fiduciary duty.  19 Q. Is it the Trust's position that  20 the fact that Candlewood was seeking a  21 recapitalization on behalf of Mr. Morgan, that  22 that somehow delayed or stopped what Houlihan  23 was doing to try and find a sale?  24 A. Yes.  25 Q. And what does the Trust base that</p>	<p style="text-align: right;">Page 220</p> <p>1 clearly -- this is not a situation, and  2 Houlihan, as I said earlier, did a pretty good  3 job of explaining why Article 9 doesn't work  4 here and wouldn't work here, which is something  5 that one would think that Candlewood would know  6 before they interpose the proposal.  7 Q. Well, and the special transaction  8 committee, though, didn't accept any of those  9 proposals, did they?  10 A. Ultimately, no; but the process is  11 delayed while they're looking at them,  12 considering them, waiting for them. And then,  13 you know, we're into February now. We're a  14 year into the process and we don't really have  15 a buyer identified even though several, you  16 know -- at least there's been some indications  17 of interest, and now Houlihan is running a  18 distressed process and there are -- appear to  19 be various management meetings and things going  20 on with various parties.  21 And you've got, I think, in  22 March -- the March time frame the 363 folks  23 come out, Marlin and Monomoy and Whitney, and  24 they're all interested at certain levels but  25 they all want 363.</p>
<p style="text-align: right;">Page 219</p> <p>1 upon?  2 A. Well, I think if you look at the  3 timeline, again, you've got initial indications  4 of value that come back in October saying there  5 isn't enough value here to pay all of the debt  6 in full and so we've got to kind of go back to  7 the drawing board and think about a different  8 process. This is a distressed sale now.  9 But in the midst of that,  10 Candlewood and Mr. Morgan come in with a  11 proposal that talks about a different type of  12 transaction that would not be a change of  13 control transaction but would somehow end up  14 getting value to other parties, although it's  15 not abundantly clear how.  16 And the Sun offer goes -- the  17 Sun -- I say offer, I apologize, it's an  18 expression of interest. The Sun offer  19 expression of interest, there's no response to  20 it. We don't know what happens there.  21 So -- and then there's nothing  22 really, it seems, that happens beyond until the  23 end of the year, and then we have a couple  24 proposals. A Candlewood proposal in, I think  25 it's late January, the Article 9 proposal that</p>	<p style="text-align: right;">Page 221</p> <p>1 And once again there is this, you  2 know, term sheet that, again, Houlihan  3 expresses real concern over with respect to  4 Candlewood's ability to get it done with GSC  5 and, you know, it doesn't make -- the proposal  6 doesn't make a lot of sense but -- at least  7 initially but yet exclusivity is given --  8 Q. Let me stop you there.  9 A. -- and it's another thirty days.  10 Q. Exclusivity was given with respect  11 to which --  12 A. The GSC proposal, although, I'm a  13 little fuzzy, I guess, which one, but I think  14 it was sort of -- it was yet another -- it was  15 a recapitalization-type deal that GSC was  16 proposing.  17 Q. And that was the only time that a  18 proposal brought by Mr. Morgan and Candlewood  19 was actually granted exclusivity; isn't that  20 correct?  21 A. That is correct.  22 Q. Okay. So I guess I'm not  23 understanding where the delay comes in. I  24 understand that Mr. Morgan and Candlewood  25 presented various options to the special</p>

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<p>1 transaction committee, all of which were 2 ultimately rejected by the special transaction 3 committee; but I just want to be clear, is it 4 your testimony that while those proposals were 5 being made to the special transaction 6 committee, Houlihan was not moving forward in 7 its process?</p> <p>8 A. From the documents, it appears to 9 me that the delay was from the early November 10 2007 time frame up through probably, what, 11 certainly that time in April, late April, and 12 maybe into May there were still -- you know, 13 there were proposals being made up -- as I'm 14 sure you know, up until late May, early June 15 time frame, the backstopping of the ESOP notes 16 which frankly was rejected twice, I guess, by 17 the banks. It got submitted once and rejected 18 and then a week later submitted again by 19 Candlewood and the people were asking, well, 20 what's different about this. Really nothing.</p> <p>21 Q. My question, though, was a little 22 bit more specific. Is it the Trust's position 23 that while Candlewood was doing what it was 24 doing and making its proposal Houlihan just 25 stopped working?</p>	<p>1 Q. Wasn't that Houlihan's role as the 2 exclusive financial advisor to the company?</p> <p>3 A. Yes.</p> <p>4 Q. Okay. There are allegations in 5 the complaint, specifically Paragraph 116, that 6 talks about payments made or payments planned 7 to be made to Candlewood. With respect to the 8 portion of that allegation that refers to 9 planned to make payments to Candlewood, it is 10 my understanding that ultimately the special 11 transaction committee agreed that if Candlewood 12 brought a successful proposal to the -- to the 13 company and a recapitalization did, in fact, 14 occur, that the company would at least pay a 15 portion of Candlewood's fee; but that never 16 happened, did it?</p> <p>17 A. No, it did not. Although, the 18 company -- I thought that the company had paid 19 a portion of Candlewood's expenses and some 20 sort of fee in the -- for the August, September 21 time frame --</p> <p>22 Q. Yes.</p> <p>23 A. -- of '07.</p> <p>24 Q. My understanding is that there was 25 a payment made based upon work that Candlewood</p>
Page 223	Page 225
<p>1 A. There was a time that they -- it 2 appears that there were issues. And there's a 3 reference to that, I think, in an e-mail in the 4 November time frame when Houlihan was wanting 5 to get their carve-out, and that's a Houlihan 6 issue.</p> <p>7 Q. Yes.</p> <p>8 A. So I'm not suggesting that's a 9 Candlewood issue, but Candlewood obviously had 10 already entered into the process at that 11 juncture.</p> <p>12 It certainly appears that beyond 13 that and beyond the -- the -- sorry, it's 14 late -- the January -- basically beyond that 15 time period in January, that the parties 16 were -- that Houlihan appears to have been 17 doing things and both of them appear -- but 18 Candlewood appears to have been doing things 19 with Mr. Morgan and Houlihan appears to have 20 been doing things as well in terms of 21 management meetings and what have you.</p> <p>22 And, frankly, Candlewood -- the 23 other thing, Houlihan is assessing the 24 Candlewood offers, I guess that's the other 25 thing as it goes.</p>	<p>1 had done prior to being retained by Mr. Morgan.</p> <p>2 A. Yes.</p> <p>3 MS. BRENNAN: I do not have any 4 further questions at this time. Thank you very 5 much.</p> <p>6 THE WITNESS: Thank you.</p> <p>7 THE VIDEOGRAPHER: We're off the 8 record.</p> <p>9 (Thereupon, the deposition was 10 adjourned at 4:39 p.m.)</p> <p>11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

<p style="text-align: right;">Page 226</p> <p>1 I, W. TIMOTHY MILLER, do hereby certify  2 that the foregoing is a true and accurate  3 transcription of my testimony.  4  5  6 -----  7  8 Dated -----  9  10  11  12  13  14  15  16  17  18  19  20  21  22  23  24  25</p>	<p style="text-align: right;">Page 228</p> <p>1 IN WITNESS WHEREOF, I have hereunto set  2 my hand and seal of office at Dayton, Ohio, on  3 this ____ day of _____, 2012.  4  5  6 -----  7 KATHY S. WYSONG, RPR  8 NOTARY PUBLIC, STATE OF OHIO  9 My commission expires 12-1-2013  10  11  12  13  14  15  16  17  18  19  20  21  22  23  24  25</p>
<p style="text-align: right;">Page 227</p> <p>1 STATE OF OHIO )  2 COUNTY OF MONTGOMERY ) SS: CERTIFICATE  3 I, Kathy S. Wysong, a Notary  4 Public within and for the State of Ohio, duly  5 commissioned and qualified,  6 DO HEREBY CERTIFY that the  7 above-named W. TIMOTHY MILLER, was by me first  8 duly sworn to testify the truth, the whole truth  9 and nothing but the truth.  10 Said testimony was reduced to  11 writing by me stenographically in the presence  12 of the witness and thereafter reduced to  13 typewriting.  14 I FURTHER CERTIFY that I am not a  15 relative or Attorney of either party, in any  16 manner interested in the event of this action,  17 nor am I, or the court reporting firm with which  18 I am affiliated, under a contract as defined in  19 Civil Rule 28(D).  20  21  22  23  24  25</p>	



1 STATE OF OHIO )

2 COUNTY OF MONTGOMERY ) SS: CERTIFICATE

3 I, Kathy S. Wysong, a Notary  
4 Public within and for the State of Ohio, duly  
5 commissioned and qualified,

6 DO HEREBY CERTIFY that the  
7 above-named W. TIMOTHY MILLER, was by me first  
8 duly sworn to testify the truth, the whole truth  
9 and nothing but the truth.

10 Said testimony was reduced to  
11 writing by me stenographically in the presence  
12 of the witness and thereafter reduced to  
13 typewriting.

14 I FURTHER CERTIFY that I am not a  
15 relative or Attorney of either party, in any  
16 manner interested in the event of this action,  
17 nor am I, or the court reporting firm with which  
18 I am affiliated, under a contract as defined in  
19 Civil Rule 28(D).

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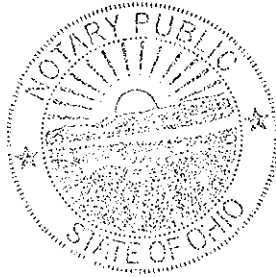
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1                   IN WITNESS WHEREOF, I have hereunto set  
2 my hand and seal of office at Dayton, Ohio, on  
3 this 31st day of December, 2012.

4                   *Kathy J. Wyong*



KATHY S. WYSONG, RPR  
NOTARY PUBLIC, STATE OF OHIO  
My commission expires 12-1-2013

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION (DAYTON)

\* \* \*

In Re: The Antioch Company, et al.,  
Debtors. CASE NO. 3:10-CV-156

THE ANTIOCH LITIGATION TRUST,  
W. TIMOTHY MILLER, TRUSTEE, BANKRUPTCY CASE NO.  
Plaintiff, 08-35741

vs. ADV. PRO. CASE NO.  
09-3409

LEE MORGAN, et al.,  
Defendants. Volume II

\* \* \*

Continuation of the deposition of  
W. TIMOTHY MILLER, Plaintiff herein, called by the  
Defendants Lee Morgan, Asha Morgan Moran, Chandra  
Attiken, Marty Moran, Lee Morgan GDOT Trust #1,  
Lee Morgan GDOT Trust #2, Lee Morgan GDOT Trust  
#3, Lee Morgan Pourover Trust #1, and Lee Morgan  
Pourover Trust #2 for cross-examination pursuant  
to the Rules of Civil Procedure, taken before me,  
Kathy S. Wysong, a Notary Public in and for the  
State of Ohio, at the offices of Taft, Stettinius  
& Hollister, LLP, 1800 US Bank Tower, 425 Walnut  
Street, Cincinnati, Ohio, on Tuesday, December 18,  
2012, at 9:36 a.m.

\* \* \*

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<p>1 EXAMINATIONS CONDUCTED PAGE</p> <p>2 BY MR. KNOTH:..... 235</p> <p>3 BY MR. KLINGLER:..... 292</p> <p>4 BY MR. GENTRY:..... 348</p> <p>5 BY MR. OTSUKA:..... 411</p> <p>6 BY MR. SCHEIER:..... 458</p> <p>7</p> <p>8 EXHIBITS MARKED</p> <p>9 (Thereupon, Exhibit 791, defendants 349</p> <p>10 Nancy Blair, Wayne Alan Luce, and</p> <p>11 Frederick Walker's notice of</p> <p>12 deposition of The Antioch Company</p> <p>13 Litigation Trust pursuant to Fed. R.</p> <p>14 Civ. P. 30(b)(6), was marked for</p> <p>15 purposes of identification.).....</p> <p>16 (Thereupon, Exhibit 792, excerpt of 402</p> <p>17 Exhibit 319, was marked for purposes</p> <p>18 of identification.).....</p> <p>19 (Thereupon, Exhibit 793, 404</p> <p>20 correspondence from Jeanine</p> <p>21 McLaughlin, Alan Luce, Denis Sanan,</p> <p>22 and James Northrop to Miss Andrew or</p> <p>23 Christina Fischer, was marked for</p> <p>24 purposes of identification.).....</p> <p>25</p>	<p>1 APPEARANCES:</p> <p>2 On behalf of the Plaintiff:</p> <p>3 Taft Stettinius &amp; Hollister LLP</p> <p>4 By: Marcia Voorhis Andrew</p> <p>5 Emily McNicholas</p> <p>6 Attorneys at Law</p> <p>7 425 Walnut Street</p> <p>8 Suite 1800</p> <p>9 Cincinnati, Ohio 45202-3957</p> <p>10</p> <p>11 On behalf of the Defendants Lee Morgan, Asha</p> <p>12 Morgan Moran, Chandra Attiken, Marty Moran, Lee</p> <p>13 Morgan GDOT Trust #1, Lee Morgan GDOT Trust</p> <p>14 #2, Lee Morgan GDOT Trust #3, Lee Morgan</p> <p>15 Pourover Trust #1, and Lee Morgan Pourover</p> <p>16 Trust #2:</p> <p>17 Keating Muething &amp; Klekamp</p> <p>18 By: Michael L. Scheier</p> <p>19 Brian Muething (Telephonically)</p> <p>20 Attorneys at Law</p> <p>21 One East Fourth Street</p> <p>22 Suite 1400</p> <p>23 Cincinnati, Ohio 45202-3752</p> <p>24</p> <p>25 On behalf of the Defendant McDermott Will &amp;</p> <p>Emery LLP:</p> <p>Faruki Ireland &amp; Cox P.L.L.</p> <p>By: Jeffrey S. Sharkey</p> <p>Attorney at Law</p> <p>500 Courthouse Plaza, S.W.</p> <p>10 North Ludlow Street</p> <p>Dayton, Ohio 45402</p>
Page 231	Page 233
<p>1 (Thereupon, Exhibit 794, The Antioch 411</p> <p>2 Company Litigation Trust's response</p> <p>3 to first set of interrogatories of</p> <p>4 defendants Houlihan Lokey, Inc.,</p> <p>5 Houlihan Lokey Financial Advisors,</p> <p>6 Inc. and Houlihan Lokey Capital,</p> <p>7 Inc., was marked for purposes of</p> <p>8 identification.).....</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 On behalf of the Defendants Nancy Blair, Wayne</p> <p>2 Alan Luce, and Frederick Walker:</p> <p>3 Coolidge Wall</p> <p>4 By: Daniel J. Gentry</p> <p>5 Terrence Fague (Telephonically)</p> <p>6 Attorneys at Law</p> <p>7 Suite 600</p> <p>8 33 West First Street</p> <p>9 Dayton, Ohio 45402</p> <p>10 On behalf of the Defendants Ben Carlson, Denis</p> <p>11 Sanan, Jeanine McLaughlin, and Malte</p> <p>12 vonMatthiessen:</p> <p>13 Thompson Hine, LLP</p> <p>14 By: Jennifer Maffett</p> <p>15 Thomas A. Knot</p> <p>16 Attorneys at Law</p> <p>17 Austin Landing I</p> <p>18 10050 Innovation Drive</p> <p>19 Suite 400</p> <p>20 Dayton, Ohio 45342-4934</p> <p>21 On behalf of the Defendants Houlihan Lokey</p> <p>22 Howard &amp; Zukin, Inc.; Houlihan Lokey Howard &amp;</p> <p>23 Zukin Financial Advisors, Inc.; and Houlihan</p> <p>24 Lokey Howard &amp; Zukin Capital, Inc.:</p> <p>25 DLA Piper LLP</p> <p>By: Greg Otsuka (Telephonically)</p> <p>Attorney at Law</p> <p>203 North LaSalle Street</p> <p>Suite 1900</p> <p>Chicago, Illinois 60601</p>

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<p>1 On behalf of the Defendant Candlewood Partners, LLC:</p> <p>2       McCarthy, Lebit, Crystal &amp; 3       Liffman Co., L.P.A.</p> <p>4 By: Kimberly A. Brennan Christina E. Niro (Telephonically) 5       Attorneys at Law 101 West Prospect Avenue 6       Suite 1800 Cleveland, Ohio 44115</p> <p>7 On behalf of the Defendants Barry Hoskins, 8 G. Robert Morris, Kimberly Lipson Wilson, Karen Felix, and Steve Bevelhymmer:</p> <p>9       Law Office of Robert A. Klingler 10       Co., L.P.A.</p> <p>11 By: Robert A. Klingler Attorney at Law 12       525 Vine Street Suite 2320 13       Cincinnati, Ohio 45202-3124</p> <p>14 On behalf of the Defendant James Northrop: 15       R. Daniel Prentiss, P.C.</p> <p>16 By: R. Daniel Prentiss Attorney at Law 17       One Turks Head Place Suite 380 18       Providence, Rhode Island 02903</p> <p>19 ALSO PRESENT: 20       Richard Stevens, Videographer 21       * * *</p> <p>22       THE VIDEOGRAPHER: We're on the 23 record. 24 25</p>	<p>1 transaction was a fraudulent conveyance?</p> <p>2       A. Yes.</p> <p>3       Q. And also you believe that the 4 tender offer should have disclosed that the 5 transaction was voidable because it was a 6 fraudulent conveyance; is that right?</p> <p>7       A. Yes.</p> <p>8       Q. Okay. Can you explain to us why 9 you contend that this 2003 transaction was a 10 fraudulent conveyance?</p> <p>11       A. Of course. Approximately, if I 12 recall the numbers correctly, two hundred and 13 forty-four million dollars of value went out of 14 the company in the form of cash, debt, and I 15 guess some portion of that are the warrants, 16 which would be -- I would probably deduct from 17 that two forty-four the warrant value, but that 18 much value went out of the company. Nothing 19 came in. And the company was clearly rendered 20 balance sheet insolvent as a result of that 21 transaction.</p> <p>22       Q. Anything else?</p> <p>23       A. Those are -- yeah, I mean, that -- 24 you know, those are the elements. You know, 25 we've got no value in exchange and the company</p>
Page 235	Page 237
<p>1       W. TIMOTHY MILLER</p> <p>2 of lawful age, Plaintiff herein, having been first 3 duly cautioned and sworn, as hereinafter 4 certified, was examined and said as follows:</p> <p>5       CROSS-EXAMINATION</p> <p>6 BY MR. KNOTH:</p> <p>7       Q. Mr. Miller, my name is Tom Knoth. 8 We met yesterday.</p> <p>9       A. Yes.</p> <p>10       Q. I represent four of the outside 11 director defendants, Ben Carlson, Jeanine 12 McLaughlin, Denis Sanan, and Malte 13 vonMatthiessen. Okay?</p> <p>14       A. Okay.</p> <p>15       Q. I'm going to ask you some 16 questions today. A lot of them are going to be 17 follow-ups to yesterday. There may be a couple 18 additional new categories.</p> <p>19       A. Okay.</p> <p>20       Q. Let me start off with what you 21 testified yesterday about potential fraudulent 22 conveyances, and I want to make sure I 23 understood your testimony correctly and then 24 I'm going to ask you some questions. Am I 25 correct that you believe that the 2003</p>	<p>1 is rendered balance sheet insolvent.</p> <p>2       Q. Okay. As far as nothing coming 3 in, the company acquired the shares of the 4 nonESOP shareholders, didn't they?</p> <p>5       A. Those became treasury stock, yeah. 6 Uh-huh.</p> <p>7       Q. So the company did acquire those 8 shares?</p> <p>9       A. Yes.</p> <p>10       Q. And Deloitte had projected in 11 addition to the receipt of the shares that the 12 company stood to gain on a net basis a hundred 13 and thirty million dollars over ten years if 14 the transaction proceeded as projected; is that 15 correct?</p> <p>16       A. My understanding of the numbers 17 was that there was a stream of payments 18 purported tax savings over a period of time and 19 that the present value of that stream was, like 20 I said -- I think I testified yesterday my 21 recollection of the documents is that there was 22 a reference in the Deloitte e-mail to it being 23 sixty million and I thought the Duff &amp; Phelps 24 valuation might have put it in the seventy-four 25 million dollar range.</p>



<p style="text-align: right;">Page 238</p> <p>1 Q. And that's the present value, 2 correct? 3 A. Present value of that stream of 4 payments. 5 Q. The actual dollar amount was a 6 hundred and thirty million dollars projected by 7 Deloitte; is that right? 8 A. I don't know that it was -- I 9 don't recall that number being specifically a 10 hundred and thirty million dollars. I don't 11 know where you're getting that number from, I 12 guess. 13 Q. You don't recall that as being the 14 net proceeds after you deduct out the financing 15 and the interest and things like that? 16 A. You'd have to show me the exhibit 17 you're talking about. 18 Q. Based upon your review of the 19 record, are you aware of any facts indicating 20 that the outside directors were ever advised by 21 any of the advisors or by management that the 22 transaction was a possible fraudulent 23 conveyance? 24 A. I've not seen anything indicating 25 that they were advised of such, I guess. I'm</p>	<p style="text-align: right;">Page 240</p> <p>1 Q. You can't tell us specifically 2 what the reasons were why? 3 A. I wouldn't get into the specifics 4 of, you know, why we brought particular claims 5 and didn't bring particular claims. 6 Q. Well, I understand you may not 7 want to get into it but my question is can you 8 tell us -- 9 A. I think that that's -- 10 Q. -- what reasons you had not -- 11 A. I think that's privileged and 12 product-type information with respect to what 13 the Trust did or what it -- you know, what 14 claims it decided to bring. 15 Q. So you are claiming an 16 attorney-client privilege communication and 17 you're not going to answer the question; is 18 that right? 19 MS. ANDREW: That's correct. Yes. 20 BY MR. KNOTH: 21 Q. You used the term balance sheet 22 insolvent. What do you mean by balance sheet 23 insolvent? 24 A. Well, it means taking a look at 25 the balance sheet of the company, and in both</p>
<p style="text-align: right;">Page 239</p> <p>1 not -- that's not to say, I guess, that there's 2 something somewhere but I haven't seen it. 3 Q. And has anyone ever sued Antioch 4 or the outside directors claiming that the 2003 5 transaction was a fraudulent conveyance? 6 A. Not that I'm aware of. 7 Q. You have not asserted such a claim 8 in this lawsuit, correct? 9 A. That's correct. 10 Q. Those sorts of claims were 11 transferred to the liquidation trust in the 12 bankruptcy action, wasn't it? 13 A. Well, yes, there were claims 14 that -- yes, all of the litigation claims that 15 were out there were transferred. 16 Q. And that would have included any 17 potential fraudulent conveyance claim, correct? 18 A. Yes. 19 Q. Can you tell us why you have not 20 sued anybody claiming that this was a 21 fraudulent conveyance? 22 A. We chose to pursue breach of 23 fiduciary duty-type claims. That was, you 24 know, a decision, again, within -- that we 25 decided to make within the -- within the Trust.</p>	<p style="text-align: right;">Page 241</p> <p>1 the pro forma balance sheet and the tender 2 offer, as well as the actual subsequently 3 audited financial statements, the assets -- or 4 the liabilities exceed the assets by a 5 significant amount of money. I believe that it 6 was -- in the tender offer document it was in 7 the ninety-one million dollar range. In the 8 first audited financial statement I think it 9 was in the seventy-three, seventy-five million 10 dollar range, and that simply got worse with 11 time. 12 Q. Now, those asset values are book 13 values; is that right? 14 A. That is correct. 15 Q. Have you attempted to do a 16 valuation of the assets in 2003 or as an 17 ongoing concern using fair market value? 18 A. I have not, but I would expect 19 that to be the subject of potential expert 20 testimony. 21 Q. As you sit here today, do you have 22 a fair market value for the assets of The 23 Antioch Company in December 2003 on an ongoing 24 basis? 25 A. Not other than what's in the</p>

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<p>1 balance sheets.</p> <p>2 Q. And that's book value?</p> <p>3 A. That is whatever the auditors</p> <p>4 agreed, you know, was the appropriate value to</p> <p>5 record under GAP is what I understand that to</p> <p>6 be.</p> <p>7 Q. But not a fair valuation?</p> <p>8 A. I have not -- I mean, I -- yeah, I</p> <p>9 don't know. That's what the auditors</p> <p>10 reported -- or signed off on.</p> <p>11 Q. When you used the word insolvent</p> <p>12 when you -- for the term balance sheet</p> <p>13 insolvent, what do you mean by insolvent?</p> <p>14 A. Liabilities exceed the assets at a</p> <p>15 fair valuation.</p> <p>16 Q. Okay. And that's part of the</p> <p>17 balance sheet insolvency that you were talking</p> <p>18 about?</p> <p>19 A. Yes.</p> <p>20 Q. And I was -- I'm a little confused</p> <p>21 here. You haven't done a fair valuation of the</p> <p>22 assets for the company as of December of 2003,</p> <p>23 right?</p> <p>24 A. No. Again, I've explained to you</p> <p>25 that I believe that to be a subject of expert</p>	<p>1 the concept that the liabilities exceeded the</p> <p>2 assets?</p> <p>3 A. Again, I would leave that, I</p> <p>4 suppose, to expert testimony on that issue with</p> <p>5 respect to whether the company was left with</p> <p>6 unreasonably small capital to continue on a</p> <p>7 go-forward. I would not foreclose that</p> <p>8 possibility, no.</p> <p>9 Q. As you sit here today, are you</p> <p>10 taking that position?</p> <p>11 A. I am sitting here today taking the</p> <p>12 position that we are not foreclosing the</p> <p>13 possibility that we would assert that the</p> <p>14 company is left with unreasonably small capital</p> <p>15 and insufficient assets to pay its debts as</p> <p>16 they become due in the future.</p> <p>17 Q. You're not really answering the</p> <p>18 question. It's a yes or no question. Are you</p> <p>19 taking the position today --</p> <p>20 A. Uh-huh.</p> <p>21 Q. -- that -- that there's some other</p> <p>22 theory of insolvency other than the concept of</p> <p>23 liabilities exceeding assets at a fair</p> <p>24 valuation?</p> <p>25 A. As I sit here today, no; but I'm</p>
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<p>1 testimony.</p> <p>2 Q. So I'm not following your</p> <p>3 testimony here. You used the word balance</p> <p>4 sheet insolvency and you say that by insolvent</p> <p>5 you mean that the -- that the fair valuation,</p> <p>6 the assets are exceeded by the liabilities --</p> <p>7 A. Uh-huh.</p> <p>8 Q. -- but you haven't done that</p> <p>9 analysis; is that right?</p> <p>10 MS. ANDREW: Objection.</p> <p>11 THE WITNESS: That's correct.</p> <p>12 BY MR. KNOTH:</p> <p>13 Q. So are you saying that you are</p> <p>14 incorrectly using the term balance sheet</p> <p>15 insolvent since you don't know if the company</p> <p>16 was insolvent at the time of the transaction</p> <p>17 using a fair valuation?</p> <p>18 A. I know what is in the audited</p> <p>19 financial statements of the company.</p> <p>20 Q. Which is not necessarily a fair</p> <p>21 valuation, correct?</p> <p>22 A. It may or may not be.</p> <p>23 Q. Are you claiming that the</p> <p>24 transaction was a fraudulent conveyance using</p> <p>25 any other sort of insolvency theory other than</p>	<p>1 not foreclosing the possibility of taking that</p> <p>2 position in the future.</p> <p>3 Q. Let's look at what the directors</p> <p>4 were told in December of 2003 or in the months</p> <p>5 leading up to that about issues having to do</p> <p>6 with insolvency or asset values and things like</p> <p>7 that.</p> <p>8 As you sit here today, are you</p> <p>9 aware of any facts indicating that any of the</p> <p>10 advisors or management ever informed the</p> <p>11 outside directors that Antioch would not be</p> <p>12 able to pay its debts as they became due after</p> <p>13 the transaction?</p> <p>14 A. Specifically as to that, I can't</p> <p>15 think of anything, no, as I sit here presently.</p> <p>16 Q. And is it fair to say that the</p> <p>17 financial advisors to the company did inform</p> <p>18 the outside directors that the debt ratios for</p> <p>19 the company were good and sufficient to pay</p> <p>20 debts after the transaction based upon their</p> <p>21 calculations?</p> <p>22 A. You'd have to show me the</p> <p>23 document.</p> <p>24 Q. As you sit here today, can you</p> <p>25 dispute that one way or the other?</p>

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<p>1 A. I'm not aware of there being a 2 document that says that, I guess. I know 3 that -- well, I don't know that I've seen a 4 document that says that.</p> <p>5 Q. Okay. Let's put it the other way, 6 the converse. Are you aware of any facts 7 indicating that the outside directors were ever 8 informed that the debt coverage ratios were not 9 satisfactory to establish that the company 10 would be able to pay its debts going forward 11 once the transaction closed?</p> <p>12 A. Again, I'm not aware of anything 13 as I sit here today to that effect.</p> <p>14 Q. I think you testified yesterday 15 that one of your criticisms of the board was 16 that, in your opinion, the directors did not 17 dig into the financials sufficiently. Is that 18 correct?</p> <p>19 A. That is correct.</p> <p>20 Q. Okay. Are you aware that the 21 board of directors ordered the financial 22 advisors to do a sensitivity analysis?</p> <p>23 A. Yes, I've seen reference to that.</p> <p>24 Yes.</p> <p>25 Q. And do you have any criticisms of</p>	<p>1 into consideration the impact on the employees. 2 There were forty-plus employees that had a 3 million dollar accounts and there were a decent 4 number of others that had in excess of a half 5 million dollars and what those employees were 6 likely to do when they saw management, you 7 know, essentially cashing out, and so that 8 piece is unclear to me.</p> <p>9 My recollection of the analysis is 10 that it showed significant negative cash flow 11 in the first few years. That -- you know, I 12 don't -- it wasn't clear how the company was 13 going to manage that piece.</p> <p>14 Again, it's the -- a lot of the 15 benefits to the transaction appear to be 16 back-loaded timewise. There's a -- again, it's 17 a whole present value issue, and I don't know 18 that the present value issue was ever disclosed 19 or explained in that in terms of, you know, a 20 lot of value is going out now in exchange for 21 the possibility of us getting value in the 22 future and that possibility is entirely tied to 23 the companies doing the various projections -- 24 you know, doing the sales and the projections 25 that all these numbers are based upon. If they</p>
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<p>1 the sensitivity analysis as you sit here today?</p> <p>2 A. Well, there were various documents 3 that I think may have been referred to as a 4 sensitivity analysis. There's one in 5 particular, I guess, that comes to mind with 6 respect to the December 4th board meeting; and, 7 yes, I mean, I think we could take a look 8 through that document if you'd like to take a 9 look through that document.</p> <p>10 Q. Do you -- as you sit here today, 11 do you have any criticisms?</p> <p>12 A. Yes, I think I do. There was a 13 question as to who actually prepared the 14 document, I think. The best that I could tell 15 from what I had seen it was -- there was 16 some -- a director or two thought it was 17 Deloitte but others indicated, I thought, that 18 it was really the company who prepared that 19 because it doesn't have Deloitte's name on it 20 anywhere, and so there was an issue with 21 respect to that.</p> <p>22 And my recollection of the 23 document is that there wasn't a lot in the way 24 of support for the ESOP repurchase liability 25 and how they got to that and whether they took</p>	<p>1 don't have the revenues or their expenses are 2 high -- you know, if they don't -- there aren't 3 going to be the tax savings if there aren't the 4 revenues there or if the expenses are out of 5 whack so, you know, there isn't going to be the 6 value that these folks are projecting will come 7 back to the company over a period of time.</p> <p>8 So, I mean, those are the things I 9 can think of off the top of my head. That may 10 or may not be everything.</p> <p>11 Q. Is there something you need to 12 consult in order to come up with everything?</p> <p>13 A. Well, you've mentioned the 14 sensitivity analysis. Why don't you show me 15 what sensitivity analysis you're talking about.</p> <p>16 Q. I'm referring to the same December 17 4th --</p> <p>18 A. Are you?</p> <p>19 Q. -- 2003.</p> <p>20 A. Okay. Well, let's pull a copy of 21 it.</p> <p>22 MR. KNOTH: Let's go off the record 23 for a second.</p> <p>24 THE VIDEOGRAPHER: We're off the 25 record.</p>

<p style="text-align: right;">Page 250</p> <p>1 (Pause in proceedings.)  2 THE VIDEOGRAPHER: We're on the  3 record.  4 BY MR. KNOTH:  5 Q. Okay. Mr. Miller, I've handed you  6 what's been marked as Deposition Exhibit 13  7 marked in a prior deposition. Is this the  8 sensitivity analysis you've been talking about?  9 A. I think that it is, but I --  10 again, I recall that there's one that is a full  11 page, and it may be a different deposition  12 number but --  13 Q. You think it's just larger?  14 A. Yeah, larger full page per slide,  15 sort of, format --  16 Q. Easier to read?  17 A. -- that's a little easier to read  18 and -- you know, so.  19 Q. Okay. Now, having looked at it,  20 is there any other criticisms that you have of  21 the sensitivity analysis that you haven't  22 mentioned already?  23 A. Let me look at the assumptions  24 here. Okay. This may go to the earlier one,  25 but on -- I guess it's MO0001773 is the page,</p>	<p style="text-align: right;">Page 252</p> <p>1 Q. So this sensitivity analysis is  2 concluding that even if the company has a sales  3 decline of what it assumed of twenty-five  4 percent over a ten year period, the company  5 would still have enough money to pay its debts;  6 is that right?  7 A. That's what it says.  8 Q. Okay. If you look at the very  9 next page, which is a spreadsheet, is it your  10 understanding that this spreadsheet comes from  11 Deloitte?  12 A. I don't know precisely where it  13 comes from, and it does not appear to say.  14 Q. Okay.  15 A. But it appears to be the format  16 that Deloitte generated from its models, I will  17 say that much for it, and this is the one that  18 you'll have to pardon me on, I'm having a  19 little difficulty reading.  20 Q. Yeah, and I would too without my  21 glasses so I understand that. Well, you can put  22 that aside for now. I wanted to ask you some  23 more questions about your fraudulent conveyance  24 theory.  25 Let me ask you what your</p>
<p style="text-align: right;">Page 251</p> <p>1 this line on the top there talks about the -- I  2 guess the potential incremental cash flow over  3 ten years. Again, I read that as being not  4 discounted to present value.  5 Q. Right. So this --  6 A. Okay.  7 Q. -- slide is showing even with the  8 downside scenario of a twenty-five percent  9 decline in sales over a number of years, that  10 the company would still have net incremental  11 cash in the company of sixty-two million  12 dollars not discounted to present value; is  13 that right?  14 A. That's what that appears to show  15 to me, yes.  16 Q. Now, if you look down at the slide  17 below that on that page --  18 A. Uh-huh.  19 Q. -- there's a cash flow statement,  20 and it says despite sales decline and margin  21 erosion, enough cash is generated to pay bank  22 debts, subordinated debt, repurchase  23 obligation, and minimum level of capital  24 expenditures. Do you see that?  25 A. Yes, I do.</p>	<p style="text-align: right;">Page 253</p> <p>1 understanding is as to what the board was told  2 about what the fair market value was of the  3 assets in comparison with the liabilities  4 during the valuation process for the  5 transaction. Isn't it true that both Deloitte  6 and Houlihan Lokey informed the board that the  7 fair market value of the assets exceeded the  8 liabilities by over two hundred million dollars  9 post-transaction, that was at least their  10 projection?  11 A. And, again, if what we're -- if  12 we're talking about the same things here, the  13 valuations that were done, as I understood  14 them, were done on discounted cash flow and  15 market comparables, right?  16 Q. Is that what your --  17 A. That's my understanding, if that's  18 what you're talking about --  19 Q. Okay.  20 A. -- in terms of the valuation. And  21 the discounted cash flows were based upon the  22 company's future projections of sales beyond,  23 you know, the current period.  24 And the market comparables were  25 done using multiples, as I understand it, from</p>

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1 what were deemed to be comparable companies.  
2 And the purpose of that, as I understood it,  
3 was to value the stock of the company through  
4 those two approaches.

5 I'm not aware that somebody came  
6 in and actually went through the asset  
7 classifications on the balance sheet and valued  
8 those at fair market value. If that happened,  
9 maybe I missed that, but -- or maybe you can  
10 point me to a document where that occurred.

11 Q. Are you claiming that it's  
12 inappropriate when valuing the assets of a  
13 company for purposes of determining its fair  
14 valuation as an ongoing business to use either  
15 the discounted cash flow method or the market  
16 comparison methodology?

17 A. I think for purposes of a  
18 fraudulent conveyance analysis, you're looking  
19 at the assets at a fair valuation on -- you  
20 know, what the assets are on the balance sheet.  
21 That's my understanding of it. And so I'm not  
22 aware that that analysis was done in connection  
23 with this.

24 Q. Let's switch subjects, and I want  
25 to go over your testimony yesterday about your

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1 theory about the sales process. And I want to  
2 make sure I understood what you were saying  
3 first of all.

4 You were -- you were testifying  
5 that you believed the company should have  
6 engaged in a 363 sale at some point; is that  
7 right?

8 A. Yes.

9 Q. And when in time are you saying  
10 that the company should have filed bankruptcy  
11 and pursued the 363 sale?

12 A. Well, at some point in time  
13 shortly after the valuations, I guess, from  
14 what was the initial M&A process with the  
15 initial Houlihan people brought back  
16 indications of value that were not sufficient  
17 to pay all the debt in full; and that, I  
18 believe, was in the August, September '07 time  
19 frame possibly. And then it looked like again  
20 there's a -- Houlihan has a pretty good outline  
21 of what happened when and I defer to that,  
22 but --

23 Q. Right. I think it's in front of  
24 you.

25 A. Is it?

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1 Q. I think it's the November  
2 presentation. If I'm not mistaken, I think  
3 it's Exhibit 183 or something like that.

4 A. It's this one. It's the one that  
5 looks like an e-mail. Let's see. Let's take a  
6 look here. Okay. That's through August and  
7 then --

8 Q. I think if you look at page 4163,  
9 that's the -- we get into a discussion about  
10 Sun Capital.

11 A. Uh-huh.

12 Q. You see that? It talks about on  
13 October 24th, 2007, Sun Capital delivered the  
14 message they were not going to be in a position  
15 to mark up the purchase order and submit a  
16 final bid. Do you see that?

17 A. Just a second. What number? I'm  
18 sorry.

19 Q. It's -- I think it's 4163.

20 MR. SCHEIER: You mean purchase  
21 agreement, right?

22 MR. KNOTH: Pardon me?

23 MR. SCHEIER: Purchase agreement.  
24 You said purchase order.

25 MR. KNOTH: Oh, I'm -- yeah, purchase

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1 agreement. I'm sorry.

2 MR. SCHEIER: That's okay.

3 BY MR. KNOTH:

4 Q. Do you have that page in front of  
5 you?

6 A. Yeah, 63. Uh-huh.

7 Q. Okay. This dates at least the Sun  
8 Capital indication that they weren't going to  
9 submit a final bid as of October 24th, 2007.  
10 Do you see that?

11 A. Yeah, but -- yeah, Jostens, I  
12 guess, delivered a similar message, I guess --

13 Q. Two days before?

14 A. -- a couple days earlier, right.

15 Q. Okay.

16 A. I was trying to sort out in my  
17 mind where Jostens was at.

18 Q. Right. And I'm trying to  
19 determine what your theory is about timing  
20 here. So we have Sun Capital delivering its  
21 message on October 24th, 2007.

22 A. Uh-huh.

23 Q. Are you contending that the next  
24 day the company should have filed bankruptcy  
25 and pursued the 363 sale --

8 (Pages 254 to 257)



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<p>1 A. No.</p> <p>2 Q. -- or what?</p> <p>3 A. No. I think what we're contending</p> <p>4 is that, you know, once those indications of</p> <p>5 interest came back where they were at, and Sun</p> <p>6 is saying, you know, here's a different</p> <p>7 proposal we'll do, and in the midst of this</p> <p>8 Candlewood and Lee Morgan are coming in within</p> <p>9 a day or two of this with their proposal to the</p> <p>10 special committee, in relatively short order,</p> <p>11 it seems to me, the board should have been</p> <p>12 going back with, you know, some sort of</p> <p>13 response to Sun, and also having what they</p> <p>14 ultimately had done, I guess, which was</p> <p>15 Houlihan go out and look for distressed buyers</p> <p>16 and to proceed in that instance toward going to</p> <p>17 the 363 sale on a go-forward at that juncture</p> <p>18 at -- you're in -- you're at the end of</p> <p>19 October, November, you know, timingwise, it</p> <p>20 seems that that's something that could be done</p> <p>21 within the next, I don't know, sixty, ninety</p> <p>22 days if the company can -- can do that. You</p> <p>23 know, if -- or less, but, you know, depending</p> <p>24 on how quickly the buyers are willing to move.</p> <p>25 But, you know, you don't have indications of</p>	<p>1 know, pretty promptly, certainly before the end</p> <p>2 of the year. Whether or not they would</p> <p>3 close -- I mean, there -- I mean, you know, you</p> <p>4 never know, but there's some reason for</p> <p>5 potential buyers who may want to close before</p> <p>6 the end of the year or not, who knows.</p> <p>7 Q. Now, I take it you're not an</p> <p>8 investment banker; is that right?</p> <p>9 A. No, I am not.</p> <p>10 Q. So how long it might take in order</p> <p>11 to explore the distressed market you're not in</p> <p>12 a position to say yourself, are you?</p> <p>13 A. I am not.</p> <p>14 Q. Okay. But you would at least</p> <p>15 allow some time, whatever an adequate amount of</p> <p>16 time would be, to do that --</p> <p>17 A. Correct.</p> <p>18 Q. -- before you would file your</p> <p>19 bankruptcy action and your 363 motion, right?</p> <p>20 A. I think the objective on what the</p> <p>21 company was ultimately geared toward doing was</p> <p>22 identifying a stocking horse purchaser, a party</p> <p>23 from whom -- you know, who will establish a</p> <p>24 floor of value for the company's assets in what</p> <p>25 would be an auction process, and that's the</p>
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<p>1 value from independent, you know, third-party,</p> <p>2 financially responsible potential acquirers</p> <p>3 that exceed your debt.</p> <p>4 Q. Okay. So let me -- I don't mean</p> <p>5 to cut you off here --</p> <p>6 A. Sure.</p> <p>7 Q. -- but I have a limited amount of</p> <p>8 time here.</p> <p>9 A. Of course.</p> <p>10 Q. I just want to make sure I get the</p> <p>11 timing right.</p> <p>12 So we have end of October and</p> <p>13 you're saying sixty to ninety days, maybe up to</p> <p>14 around February 1st, for the company to go out</p> <p>15 and either try to negotiate something with Sun</p> <p>16 Capital and/or find a distressed buyer; is that</p> <p>17 right?</p> <p>18 A. Again, it's -- in terms of finding</p> <p>19 a distressed buyer, given all that they've done</p> <p>20 thus far as I sit here and think about it, you</p> <p>21 know, it's the end of November, I don't know</p> <p>22 why, you know, necessarily they couldn't move</p> <p>23 that process through, you know, thirty,</p> <p>24 forty-five days and be into a place where</p> <p>25 they're in a process -- in a 363 sale, you</p>	<p>1 process that would occur prebankruptcy.</p> <p>2 Q. Now, are you suggesting that the</p> <p>3 company should go through the bankruptcy</p> <p>4 process and the 363 process if it does not have</p> <p>5 a signed asset purchase agreement in hand?</p> <p>6 A. No, I'm not suggesting that.</p> <p>7 Q. Okay. And your understanding of</p> <p>8 the facts is that Houlihan Lokey did go out</p> <p>9 starting October and November and start looking</p> <p>10 for buyers in a distressed market; is that</p> <p>11 right?</p> <p>12 A. I'm not clear on precisely when</p> <p>13 they started, but at some juncture after this</p> <p>14 they did. I think as I testified yesterday,</p> <p>15 it's unclear to me what happened with Sun. It</p> <p>16 does not appear that there was ever a response</p> <p>17 to Sun.</p> <p>18 Q. Let me just ask you about Sun real</p> <p>19 quick --</p> <p>20 A. Sure.</p> <p>21 Q. -- since we're on that subject.</p> <p>22 Looking at that same page of Exhibit 183 --</p> <p>23 A. Uh-huh.</p> <p>24 Q. -- under the second bullet it</p> <p>25 talks about what you characterized yesterday as</p>

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1 Sun's expression of interest.

2 A. Correct.

3 Q. And the first hash here says  
4 senior lenders would need to be willing to roll  
5 over their position of approximately  
6 fifty-eight million dollars. Do you see that?

7 A. Yes.

8 Q. Do you have any facts indicating  
9 that the senior lenders were willing to roll  
10 over their position?

11 A. At that point in time, I don't  
12 think the documents indicate that that had been  
13 broached; but that was certainly something that  
14 subsequently, I think, Candlewood had done and  
15 that maybe two of the three were willing to do  
16 it.

17 Q. But one of them being LaSalle or  
18 Bank of America?

19 A. What became Bank of America. My  
20 understanding was they did not want to do that.

21 Q. So as you sit here today, you  
22 don't know if there's any facts supporting your  
23 contention that the senior lenders may have  
24 been willing to roll over the position?

25 A. I did not make that contention.

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1 Q. I know. I mischaracterized it.  
2 I'm sorry. I misstated.

3 As you sit here today, you're not  
4 aware of any facts that indicates that in  
5 October of 2007 the senior lenders were willing  
6 to roll over their position in order to  
7 consummate a deal with Sun Capital; is that  
8 right?

9 A. I'm not aware of any facts as I  
10 sit here today.

11 Q. As you sit here today, are you  
12 critical of Houlihan Lokey's efforts to find a  
13 distressed buyer?

14 A. Yes. I mean, in the sense that  
15 they appear to have a lot of expertise in the  
16 area and they appear to have certainly  
17 canvassed and they brought folks in, but it's  
18 the timing issue that I think we're critical  
19 of, allowing their process to be delayed by  
20 Candlewood and Mr. Morgan and their efforts  
21 knowing that those folks did not want to do a  
22 change of control process and, you know,  
23 having, from what we can tell, advised the  
24 board that they ought to do a 363 sale here,  
25 that there isn't, you know, the likelihood of

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1 being able to do something outside of  
2 bankruptcy here is very slim and the board not  
3 taking their advice in that regard.

4 Q. Okay.

5 A. Yeah, I mean, I think when, you  
6 know, as a professional you're advising and a  
7 client is not following your advice and there's  
8 potential detrimental impact to the company  
9 from them not following the advice, I think you  
10 withdraw.

11 Q. Now, let's go back to the 363  
12 sale. Now, if I understand what you're saying,  
13 you're saying sometime early in 2008 the  
14 company should have been able to find a buyer  
15 in order to get a signed asset purchase  
16 agreement by early 2007 -- 2008, correct? Is  
17 that your contention?

18 A. I'm saying that it could have  
19 happened prior to then. I don't know. But  
20 certainly, you know, you've got a time frame  
21 where, you know, end of October, first of  
22 November efforts could have, should have been  
23 focused on finding a buyer. How long that  
24 actually takes to get that party in there and,  
25 you know, as you say, it's something for the

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1 investment bankers but --

2 Q. But it's fair to say that at least  
3 in early 2008 there was no signed asset  
4 purchase agreement in place; is that right?

5 A. Not that I'm aware of, no.

6 Q. Okay. And are you aware of any  
7 facts indicating that the secured lenders were  
8 willing to go through a bankruptcy action in  
9 early 2008?

10 A. Early 2008? It was my  
11 understanding that by early 2008 you have  
12 covenant defaults and LaSalle has been  
13 aggressive, I think, in the fall is my  
14 recollection of the e-mail traffic; and, you  
15 know, I'm not aware -- I guess nothing comes to  
16 mind that the bank specifically wrote on that  
17 topic, but I can't imagine why they wouldn't  
18 want to do something that would get them paid.

19 Q. Well, let me ask you this: In  
20 March of 2008 when the parties were considering  
21 the GSC recapitalization proposal, isn't it  
22 true that the banks indicated to the company  
23 that it preferred pursuing the recapitalization  
24 proposal by GSC as opposed to going through the  
25 bankruptcy 363 process with one of the three

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<p>1 companies that they had letters of intents 2 with?</p> <p>3 A. There is an e-mail to that effect 4 but not from the bank, as I understand it.</p> <p>5 Q. Do you have any facts as you sit 6 here today that disputes that contention that 7 the banks favored the GSC recapitalization 8 proposal in March of 2008 to pursuing a 363 9 sale with one of the companies that they had 10 letters of intent from?</p> <p>11 A. As I sit here today, I don't know 12 why the bank -- you know, if, in fact, the 13 banks did that as reported, I don't know why 14 they did that, you know.</p> <p>15 Q. That wasn't my question. My 16 question was are you aware of any facts that 17 dispute that as you sit here today, that that 18 was the bank's position in March of 2008?</p> <p>19 A. Well, other than it didn't come 20 from the bank, from what I can tell in terms of 21 the documents, no, I suppose not.</p> <p>22 Q. Let me ask you about the ESOP 23 trustee's position about filing bankruptcy 24 starting in January 2008 going forward. You 25 understood that the ESOP trustee at that time</p>	<p>1 bankruptcy decision -- you know, a bankruptcy 2 filing would be a decision by the board.</p> <p>3 Q. Do you think it's wise for a board 4 to do something that's futile in the sense of 5 approving a transaction that they know that the 6 ESOP trustee has already indicated would not be 7 acceptable to the ESOP trustee and that the 8 ESOP trustee would take steps to negate that 9 decision?</p> <p>10 A. I don't know that it would have 11 been futile. No shareholder really in any 12 circumstance probably ever wants to have a 13 company go into bankruptcy because shareholders 14 typically don't come out in bankruptcy. The 15 board has to make a decision of what's in the 16 best interest of the company.</p> <p>17 Q. Isn't it the actual stated facts 18 in this case that the board -- the special 19 transaction committee was closing in on 20 closing -- or accepting a proposal and signing 21 an asset purchase agreement with J.H. Whitney 22 in late May, early June --</p> <p>23 A. Yes.</p> <p>24 Q. -- of 2008?</p> <p>25 A. Uh-huh.</p>
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<p>1 was Evolve?</p> <p>2 A. It was late January, I believe, 3 that they were engaged. Is that not -- I 4 believe that's correct, if I recall, that 5 Reliance had indicated its desire to withdraw, 6 I thought, in October -- November and then 7 there was some period where the company was 8 looking for somebody new, and I thought it was 9 late January where Evolve got involved.</p> <p>10 Q. In any event, sometime in January 11 Evolve got involved; is that right?</p> <p>12 A. Correct.</p> <p>13 Q. Okay. And isn't it true that 14 Evolve's position was that it did not want to 15 go through a bankruptcy and preferred a 16 recapitalization approach?</p> <p>17 A. Oh, yes.</p> <p>18 Q. And isn't it true that as the 19 dominant shareholder, the ESOP had the ultimate 20 decision-making authority on which approach to 21 take since if it disagreed with the board, it 22 could terminate the board?</p> <p>23 A. Well, I guess it could; but, I 24 mean, the board is responsible for making the 25 decisions with respect to the company, and a</p>	<p>1 Q. And that the ESOP trustee, along 2 with Kim Lipson Wilson as trustee of the 401(k) 3 subtrust, took action to terminate the board in 4 order to prevent that sale and ultimately 363 5 sale?</p> <p>6 A. That is correct.</p> <p>7 Q. As you sit here today, do you have 8 any facts that indicate that if the board had 9 followed your approach and attempted to enter 10 into a written purchase agreement with any of 11 the three entities that it had letters of 12 intent from and tried to pursue a 363 sale, 13 that the ESOP trustee would have allowed that 14 to go through without terminating the board 15 first?</p> <p>16 A. Oh, I don't know one way or the 17 other.</p> <p>18 Q. Have you ever filed a bankruptcy 19 petition and sought a 363 sale without having a 20 signed written asset purchase agreement for any 21 of your clients?</p> <p>22 A. That's a good question. I've 23 certainly seen it done. I don't -- I don't 24 know that I have ever done it certainly with 25 respect to certain significant assets, but</p>

<p style="text-align: right;">Page 270</p> <p>1 no -- I mean -- you're talking about a business 2 as a whole? 3 Q. Right. Exactly. 4 A. I don't believe that I have. 5 Q. Okay. Let me change subjects here 6 and talk about the Condor -- 7 A. Okay. 8 Q. -- situation, and I just have some 9 very brief questions because I don't have a 10 whole lot of time here. 11 A. Okay. 12 Q. Can you tell me how you believe 13 Antioch was harmed by Condor's inability to pay 14 on the surety bond? 15 A. Well, as I understand it, and I'm 16 no expert in this area, but I understand it 17 that is an ERISA violation. That it's an ERISA 18 violation that can cause the ESOP trust to lose 19 its qualified status and would eliminate all 20 the tax benefits that were otherwise supposed 21 to be available under the hundred percent ESOP 22 transaction. And, in fact, I guess there's a 23 memo from the McDermott folks with respect to 24 that sometime in February of 2008. 25 There's also the more practical</p>	<p style="text-align: right;">Page 272</p> <p>1 first one, that's kind of the we just didn't 2 caught, right? I mean, that's the -- it 3 happened and it wasn't adequately secured, and 4 the fact that it wasn't adequately secured 5 appeared to have been covered up for a while 6 but, you know, yes, they didn't get caught, you 7 are correct. 8 Q. The IRS never took any action 9 because of that; is that correct? 10 A. Correct. That's my understanding. 11 Q. And on the restructure/sale 12 process, let me make sure I understand what 13 you're saying here, and maybe I can get at this 14 a little bit differently, if Condor had paid on 15 the ESOP notes, that would not have reduced any 16 of the liabilities of The Antioch Company, 17 would it? 18 A. No, it would not have; but it 19 would have changed creditors basically is how 20 that would have worked, and I think -- my 21 recollection of the e-mail traffic was that 22 there was some consternation over the fact that 23 that hadn't been disclosed sooner in that 24 process. 25 Q. But just follow my thought here.</p>
<p style="text-align: right;">Page 271</p> <p>1 issue of, you know, it was certainly a 2 significant impact -- or it seemed to be an 3 impact on the restructure/sale process when 4 that came to light ultimately as I -- to 5 Houlihan at least. I think that was in late 6 January of 2008. 7 So those are not good things. I 8 mean -- and that's not something I think that 9 you would want the officers of your company 10 doing is, you know, issuing notes and not 11 getting them -- having adequate security as 12 required by federal law. 13 Q. Okay. Any other harm to the 14 company caused by Condor's inability to pay? 15 A. That's what I can think of 16 presently. 17 Q. Okay. On the first one about the 18 ERISA violation and perhaps causing the ESOP to 19 lose its status and thereby eliminating tax 20 benefits to the company, that never happened; 21 is that correct? 22 A. That is correct. 23 Q. Okay. On the restructure/sale 24 process let me ask you this -- 25 A. But, again, with respect to the</p>	<p style="text-align: right;">Page 273</p> <p>1 If Condor had paid the ESOP note holders, 2 Antioch would have owed Condor the same amount 3 that Condor had paid on the ESOP notes, right? 4 A. Correct, but from the sale process 5 standpoint and being out in a market and 6 marketing the company with this being a, you 7 know, probably pretty material fact to 8 purchasers, you can see why Houlihan would have 9 some heartburn over the fact that, you know, 10 they weren't aware of this sooner. 11 Q. The ESOP note holders were 12 unsecured debtors, right? 13 A. Unsecured creditors. 14 Q. Creditors, I'm sorry. 15 A. Yes, unsecured creditors of the 16 company. 17 Q. And Condor would have been an 18 unsecured creditor, correct? 19 A. Yes. 20 Q. Let me go through some of the 21 advisors to the board in the ESOP transaction, 22 and I just want you to let me know if you are 23 challenging these advisors' qualifications or 24 expertise or reliability or competency, okay, 25 any of those four.</p>

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<p>1 As to Deloitte, are you</p> <p>2 challenging its qualifications, expertise,</p> <p>3 reliability, or competency?</p> <p>4 A. As a general matter, no.</p> <p>5 Q. In connection with the 2003 ESOP</p> <p>6 transaction.</p> <p>7 MS. ANDREW: Well, I guess I object</p> <p>8 just to the extent it's a compound question. Do</p> <p>9 you have in mind the four things?</p> <p>10 BY MR. KNOTH:</p> <p>11 Q. Well, I can break it up, Marcia.</p> <p>12 I'm trying to save time here. But is it easier</p> <p>13 for you if I --</p> <p>14 A. That might be easier if we could.</p> <p>15 Q. Okay. In the context of the 2003</p> <p>16 transaction --</p> <p>17 A. Yes.</p> <p>18 Q. -- as to Deloitte --</p> <p>19 A. Yes.</p> <p>20 Q. -- are you challenging their</p> <p>21 qualifications?</p> <p>22 A. No.</p> <p>23 Q. Are you challenging their</p> <p>24 expertise?</p> <p>25 A. No.</p>	<p>1 competency?</p> <p>2 A. They're, I'm sure, very competent.</p> <p>3 I have no reason to question their competency.</p> <p>4 Q. Okay. Same question and same</p> <p>5 context, 2003 transaction, for Houlihan Lokey,</p> <p>6 are you challenging its qualifications?</p> <p>7 A. No.</p> <p>8 Q. Its expertise?</p> <p>9 A. No. They seem to be -- I mean,</p> <p>10 appear to be experts in what they were doing.</p> <p>11 Q. Its reliability?</p> <p>12 A. Reliability is always the tough</p> <p>13 one because with Houlihan, there appeared to be</p> <p>14 issues with respect to -- as far as what maybe</p> <p>15 the board understood and what -- certainly what</p> <p>16 was placed into the tender offer that we talked</p> <p>17 about yesterday in terms of the extent of which</p> <p>18 the company and -- was entitled to rely on</p> <p>19 their opinion and the board was entitled to</p> <p>20 rely on their opinion; and they were very clear</p> <p>21 about how in the opinion it was very much</p> <p>22 limited to looking out for the selling</p> <p>23 shareholders and not the company and they</p> <p>24 weren't looking at any of those things for the</p> <p>25 company. Yet clearly the board, and I think</p>
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<p>1 Q. Are you challenging its</p> <p>2 reliability?</p> <p>3 A. How do you mean reliability?</p> <p>4 That's the one that, I guess, is throwing me a</p> <p>5 bit.</p> <p>6 Q. Do you have anything as you sit</p> <p>7 here today that suggests to you that they were</p> <p>8 not reliable such that the company should not</p> <p>9 be able to rely on their advice?</p> <p>10 A. Well, only in so far -- and from</p> <p>11 the board's perspective, as they were brought</p> <p>12 into the situation, as I understand it, having</p> <p>13 done the Morgan's estate planning. So, you</p> <p>14 know, in terms of where their interests and</p> <p>15 loyalties lie. I mean, the board appears to</p> <p>16 have been aware of that, as the other</p> <p>17 professionals were aware of that; but everyone,</p> <p>18 you know, should have been aware of the fact</p> <p>19 that they were not necessarily, you know,</p> <p>20 solely looking out for the company from what</p> <p>21 the documents indicate to me.</p> <p>22 Q. And you talked about that</p> <p>23 yesterday?</p> <p>24 A. Yes.</p> <p>25 Q. Okay. And what about Deloitte's</p>	<p>1 maybe there's board meeting minutes in October</p> <p>2 30th board meeting minutes where the</p> <p>3 implication is the board is relying on them.</p> <p>4 And, you know, particularly with respect to the</p> <p>5 tender offer document, they appear to know --</p> <p>6 you know, know and have reviewed that and saw</p> <p>7 that, you know, their opinion was being used in</p> <p>8 a way that was beyond the scope of what they</p> <p>9 originally said they were providing.</p> <p>10 Q. Any other areas of concern as far</p> <p>11 as Houlihan Lokey's reliability?</p> <p>12 A. That's what comes to mind.</p> <p>13 Q. And what about Houlihan's</p> <p>14 competency?</p> <p>15 A. No reason to question their</p> <p>16 competency.</p> <p>17 Q. Same questions for GreatBanc, do</p> <p>18 you have any issues about its qualifications?</p> <p>19 A. No.</p> <p>20 Q. Its expertise?</p> <p>21 A. No. As I sit here today, no.</p> <p>22 Q. Its reliability?</p> <p>23 A. Again, reliability is a tough one.</p> <p>24 In what -- with respect to GreatBanc as the</p> <p>25 ESOP trustee, what do you mean? What are you</p>



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1 getting at? I'm --

2 Q. Okay. Let me ask you the question  
3 a little differently. As you sit here today,  
4 do you have any reason to challenge the board's  
5 appointment of GreatBanc as an independent ESOP  
6 trustee for the 2003 transaction?

7 A. No.

8 Q. And do you have any issues with  
9 GreatBanc's competency?

10 A. No. They seem to be competent.

11 Q. Same sorts of questions for Duff &  
12 Phelps. Do you have any issues involving its  
13 qualifications?

14 A. No.

15 Q. Its expertise?

16 A. No. Huh-uh.

17 Q. Its competency?

18 A. No.

19 Q. And turning to McDermott Will &  
20 Emery, do you have any issues with its  
21 qualifications?

22 A. As a general matter, no.

23 Q. Its expertise?

24 A. Again, broad brush, I -- there  
25 are, in my view, and we've raised these, I

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1 think, in the separate litigation, that  
2 there -- you know, we do have issues with  
3 respect to the advice that was and/or wasn't  
4 given by them through that process and through  
5 the ESOP process. And particularly with the  
6 conflicts of interest and the fact that they  
7 were the ones who were, you know, handling the  
8 tender offer document and taking in comments  
9 and producing that document and, you know,  
10 presumably putting the Houlihan opinion, and  
11 all the issues we had were issues -- that I  
12 spoke about yesterday were issues that were  
13 issues that McDermott should have caught,  
14 handled, or otherwise.

15 Q. Let me just cut you off here --

16 A. Sure.

17 Q. -- because maybe my question  
18 wasn't as clear as it could be. I'm not  
19 challenging -- I'm not asking you if you're  
20 challenging McDermott Will & Emery actions.

21 A. Okay.

22 Q. I'm asking you whether or not  
23 you're challenging its expertise --

24 A. Well --

25 Q. -- that it had sufficient

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1 expertise to -- such that it was --

2 A. I'm not convinced that the people  
3 that were deployed on the engagement had all of  
4 the expertise that they needed to deal with the  
5 situation, okay, I mean, to put it -- I mean,  
6 I'm not convinced; and for those reasons, for  
7 those action reasons, that reflects in my view  
8 upon expertise --

9 Q. Okay.

10 A. -- and competency.

11 Q. Let me ask a little different  
12 question here. Are you aware of any facts  
13 indicating that the board was put on notice  
14 that McDermott Will & Emery didn't have certain  
15 sorts of expertise that you're contending it  
16 should have had?

17 A. Let me think about that one a  
18 minute. Again, to the extent the board is and  
19 they were involved in the tender offer document  
20 and that issue, and the issue particularly of  
21 the various board members who had interests in  
22 the company that they were selling and all of  
23 these folks were getting seven figures or more  
24 out of the transaction, the notion that, again,  
25 in the tender offer document that Ohio law was

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1 satisfied by the opinion of Houlihan Lokey, I  
2 would have thought that that might have raised  
3 a question with a board member in terms of is  
4 this really -- you know, does this work  
5 legally?

6 Q. And just to make sure I understand  
7 it, are you talking about the write-up of  
8 assets? Is that what you're referring to?

9 A. Well, we can talk about that  
10 later; but, no, what I'm talking about is the  
11 tender offer document itself where it says we  
12 have these various interested directors who are  
13 going to take this much money out of this  
14 transaction and when you've got interested  
15 directors, here are the three prongs of Ohio  
16 law that you have -- you know, one of those  
17 you've got to satisfy, and the very next  
18 paragraph is the board went and talked to  
19 Houlihan Lokey and they said, you know -- and  
20 if you look at Houlihan Lokey's opinion, which  
21 is attached, it's very limited. It doesn't  
22 deal with that issue. And I would think that  
23 if a board member read those two things, that  
24 you might want to question your counsel as to  
25 does this, in fact, satisfy. I mean, I'm a

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<p>1 board member here. I've got a personal 2 financial interest in this. Ohio law 3 definitely deals with this issue. I want to 4 make sure everything is done in -- you know, 5 appropriately with the law, wouldn't you ask 6 about that?</p> <p>7 Q. So you -- I'm not sure I 8 understand what you're saying here. Are you 9 saying that they should have challenged 10 McDermott Will &amp; Emery's legal advice or are 11 you saying that they should have challenged 12 their competency?</p> <p>13 A. Well, again, I guess I view the 14 legal advice given as a function of the 15 competency on the issue with which -- with 16 respect to which it's being offered. So, you 17 know, I think there might be a question there 18 that was generated by that.</p> <p>19 Q. Okay. Let's move on just because 20 I have a limited amount of time here.</p> <p>21 A. Of course.</p> <p>22 Q. Can you identify for me any facts 23 that were presented -- strike that question. 24 Let me start over. 25 Are you aware of any facts</p>	<p>1 the Morgans were certainly aware and involved 2 in the meetings, right?</p> <p>3 Q. Do you have any facts indicating 4 that the Morgans were aware of this initial 5 Duff &amp; Phelps position?</p> <p>6 A. Absolutely. Lee Morgan threatened 7 to fire them.</p> <p>8 Q. Okay. What information do you 9 have that the outside directors were made aware 10 of Duff &amp; Phelps initial response indicating 11 that --</p> <p>12 A. Well --</p> <p>13 Q. Let me back up a second. I'm not 14 sure I'm understanding what you're saying Duff 15 &amp; Phelps' initial response was. As I 16 understand it, let me make sure I understand 17 what you're saying, are you saying that Duff &amp; 18 Phelps initially indicated that the warrants 19 were more valuable than what was being, sort 20 of, assigned to them as part of the 21 negotiations?</p> <p>22 A. Correct, that they had not been 23 valued appropriately.</p> <p>24 Q. All right. 25 A. Okay.</p>
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<p>1 indicating that the board was notified by its 2 advisors or by management that the price that 3 was to be paid for the shares in the 2003 4 transaction was above the market price or fair 5 market value for the shares?</p> <p>6 A. Yes. The Duff &amp; Phelps response 7 that started in the September time frame in 8 terms of, you know, that there's too much value 9 going out for the warrants and that those ought 10 to be valued at a lower amount. And, again, 11 that's just vis-a-vis the ESOP, it's not 12 vis-a-vis the company because nobody is looking 13 out for the company here but it's just 14 vis-a-vis the ESOP. You've got that out there 15 from an advisor if that's how I understand your 16 question.</p> <p>17 Q. What facts do you have indicating 18 that that information was provided to the 19 board?</p> <p>20 A. Well, I believe that Nancy Blair 21 was clearly in the mix there. I guess I'd have 22 to --</p> <p>23 Q. She was not on the board.</p> <p>24 A. I understand. I guess I'd have to 25 go back and look at the e-mails, but I guess</p>	<p>1 Q. And that was part of the package, 2 right?</p> <p>3 A. Correct.</p> <p>4 Q. And at that point, I can't give 5 you the numbers, but there was a certain amount 6 of cash in the package, a certain promissory 7 note, and a warrant, right?</p> <p>8 A. Correct.</p> <p>9 Q. And Duff &amp; Phelps was arguing that 10 the value of the package was -- as a whole was 11 too much because if you add up the cash that 12 was in the package at the time, the promissory 13 note and what Duff &amp; Phelps thought was the 14 value of the warrants at the time, that that 15 was in excess of the eight hundred and fifty by 16 quite a bit, right?</p> <p>17 A. That's my understanding of it 18 broad brush, yeah.</p> <p>19 Q. And then ultimately as a result of 20 Duff &amp; Phelps' analysis in the party's 21 negotiations, the cash element of the package 22 was reduced, the promissory notes portion of 23 the package was reduced --</p> <p>24 A. Uh-huh. 25 Q. -- and then you still had the</p>

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<p>1 warrants, right?</p> <p>2 A. Yes, and additional dollars went</p> <p>3 out of the company in favor of the ESOP in</p> <p>4 exchange for that.</p> <p>5 Q. Okay. And then by the end of the</p> <p>6 day, by the time the transaction closed, Duff &amp;</p> <p>7 Phelps had issued a fairness opinion which was</p> <p>8 provided to the board indicating that Duff &amp;</p> <p>9 Phelps thought the consideration paid for the</p> <p>10 shares was fair, right?</p> <p>11 MS. ANDREW: Objection.</p> <p>12 THE WITNESS: No, that wasn't what</p> <p>13 the opinion said. And if it was provided to the</p> <p>14 board, it was for informational purposes. It said</p> <p>15 that it was -- the consideration was fair from a</p> <p>16 financial standpoint, I believe, for the ESOP and</p> <p>17 that any dilution caused was adequately addressed</p> <p>18 by what was essentially, as I understand it, the</p> <p>19 deal that was cut.</p> <p>20 MR. KNOTH: Let's go off the record</p> <p>21 just for a second while I pull up an exhibit.</p> <p>22 THE VIDEOGRAPHER: We're off the</p> <p>23 record.</p> <p>24 (Pause in proceedings.)</p> <p>25 THE VIDEOGRAPHER: We're on the</p>	<p>1 in the proposed transaction is fair and</p> <p>2 reasonable to the ESOP from a financial point</p> <p>3 of view; and (ii) the terms and conditions of</p> <p>4 the proposed transaction are fair and</p> <p>5 reasonable to the ESOP from a financial point</p> <p>6 of view. Did I read that correctly?</p> <p>7 A. You did. And what I was referring</p> <p>8 to was the paragraph at the very top of the</p> <p>9 page which is how they arrived at their</p> <p>10 conclusions where they say that they determined</p> <p>11 whether the post-transaction aggregate economic</p> <p>12 value of the ESOP as a whole is not less than</p> <p>13 the pre-transaction economic value immediately</p> <p>14 after the closing date, and (ii) whether there</p> <p>15 is any decline in the fair market value of the</p> <p>16 common stock as a result of the proposed</p> <p>17 transaction and, to the extent there is a</p> <p>18 decline, whether the proposed transaction</p> <p>19 appropriately compensates the participants for</p> <p>20 the decline.</p> <p>21 Duff &amp; Phelps determined that</p> <p>22 there was a decline in the value, and that they</p> <p>23 negotiated additional consideration out for the</p> <p>24 ESOP to make up for that decline. So, you</p> <p>25 know, their focus is on, again, what's in --</p>
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<p>1 record.</p> <p>2 BY MR. KNOTH:</p> <p>3 Q. Okay, Mr. Miller, during our break</p> <p>4 I've handed you what's been marked as Exhibit</p> <p>5 540 in a prior deposition, and is that the</p> <p>6 fairness opinion from Duff &amp; Phelps?</p> <p>7 A. It certainly appears to be, yes.</p> <p>8 Q. And I just want to make sure the</p> <p>9 record is clear as to what the conclusions were</p> <p>10 that Duff &amp; Phelps reached; and if you would</p> <p>11 turn to the last page, page five, do you see</p> <p>12 the heading entitled conclusions?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. So let me just read this</p> <p>15 into the record and see if you agree that I've</p> <p>16 read it correctly.</p> <p>17 A. Uh-huh.</p> <p>18 Q. Based on our analysis and review</p> <p>19 of relevant information related to Antioch and</p> <p>20 the proposed transaction, and assuming the</p> <p>21 accuracy and completeness of such information,</p> <p>22 it is our opinion that: (i) the consideration</p> <p>23 to be paid by the company for shares of the</p> <p>24 company stock -- I'm sorry, company's common</p> <p>25 stock held by shareholders other than the ESOP</p>	<p>1 what's fair to the ESOP. They're not looking</p> <p>2 at what's fair to the company.</p> <p>3 The ESOP was taking dollars out,</p> <p>4 the outside shareholders were taking dollars</p> <p>5 out, and they had professionals looking out for</p> <p>6 the people who were taking the dollars out.</p> <p>7 There were no professionals looking out for the</p> <p>8 company from which -- that was paying the</p> <p>9 dollars.</p> <p>10 Q. Well, I understand your position</p> <p>11 and I guess we'll let Lee Bloom testify as to</p> <p>12 what his position was.</p> <p>13 A. Very good.</p> <p>14 Q. Okay. Let me -- just one final</p> <p>15 subject here, and turning to the LEVIMO</p> <p>16 transaction. Can you tell me what financial</p> <p>17 damages you are contending that Antioch</p> <p>18 suffered as a result of the LEVIMO transaction</p> <p>19 itself?</p> <p>20 A. Well, again, I think generally</p> <p>21 speaking on the topic of damages, that is one</p> <p>22 that would ultimately lead to expert testimony.</p> <p>23 But in terms of LEVIMO itself, I</p> <p>24 think as I testified yesterday, our focus is</p> <p>25 upon the appropriateness and, you know, whether</p>

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<p>1 it was a breach of the board's fiduciary duty,  2 and our view that it was, to enter into that  3 particular agreement at that point in time with  4 that particular purchaser giving that  5 particular purchaser the various -- you know,  6 that control over what is the company's major  7 hard asset, you know, knowing all the issues  8 that there were with the Morgans.  9 Q. And you testified to that  10 yesterday?  11 A. Yeah, I did.  12 Q. I don't --  13 A. And I don't mean to burn up your  14 time by reiterating but I just want --  15 Q. I understand, and that's fine.  16 What I'm asking, though, is can you tell me  17 what the financial loss was to the company as a  18 result of the LEVIMO transaction itself?  19 A. Well, to the extent that the  20 position of -- his position as landlord was  21 used by Mr. Morgan in the sale process to delay  22 that process, it strikes me that it is, you  23 know, one more piece of, you know, the decline  24 in value that the company experienced through  25 that process. It was one more lever that he</p>	<p>1 testimony on that topic as well.  2 Q. I guess what I'm trying to  3 determine is what is your testimony on  4 financial loss to the company resulting from  5 the LEVIMO transaction itself, the sale of the  6 properties to the LEVIMO entity --  7 A. Uh-huh.  8 Q. -- and the lease coming back?  9 A. Absent --  10 Q. Do you see any financial loss on  11 that transaction itself?  12 A. I do not, but I am not a financial  13 expert so absent some financial expert or  14 testifying expert that the Trust may have in  15 the future, I don't see anything as I'm sitting  16 here today.  17 MR. KNOTH: Okay. I don't have any  18 further questions for you. Thank you very much.  19 THE WITNESS: Okay. Thank you.  20 MR. KNOTH: Off the record.  21 (Pause in proceedings.)  22 THE VIDEOGRAPHER: We're on the  23 record.  24 CROSS-EXAMINATION  25 BY MR. KLINGLER:</p>
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<p>1 used to try to delay a change of control  2 transaction.  3 Q. Okay. And I --  4 A. That's where I would place it.  5 Q. Okay. I just want to make sure I  6 understand what you're saying as far as  7 financial loss, though. I understand that you  8 have a position as to financial loss involving  9 the 2003 ESOP transaction, correct?  10 A. Correct.  11 Q. And I don't want to get into the  12 details there --  13 A. Sure.  14 Q. -- but you have a position on  15 that, right?  16 A. Sure.  17 Q. Okay.  18 A. Again, subject to expert  19 testimony.  20 Q. Right. And you have a position as  21 to loss -- financial loss resulting from the  22 sales process --  23 A. Yes.  24 Q. -- in 2007, 2008, right?  25 A. And, again, subject to expert</p>	<p>1 Q. Good morning, Mr. Miller. My name  2 is Bob Klingler.  3 A. Good morning.  4 Q. I represent Barry Hoskins, Kim  5 Lipson Wilson.  6 A. Okay.  7 Q. Karen Felix.  8 A. Okay.  9 Q. Steve Bevelhymer.  10 A. Okay.  11 Q. And G. Robert Morris.  12 A. All right.  13 Q. Let me start with this question:  14 Do you recall whether you reviewed the  15 depositions of any of my clients in preparation  16 for your testimony today?  17 A. I believe that I've reviewed  18 portions of those depositions, Hoskins, Lipson  19 Wilson. I'm not certain on Felix. Refresh my  20 recollection again. It's Hoskins --  21 Q. Steve Bevelhymer.  22 A. I don't know that I reviewed his.  23 I don't believe.  24 Q. And what about Robert Morris, G.  25 Robert Morris?</p>

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1 A. I don't recall having reviewed  
2 that one.

3 Q. Did you review the interrogatory  
4 answers that any of my clients submitted in  
5 this case?

6 A. Yes, I believe I did review all  
7 the interrogatory answers.

8 Q. All of them?

9 A. I believe so, yes.

10 Q. Now, I want to ask some questions  
11 first with respect to Barry Hoskins.

12 A. Okay.

13 Q. It's true, isn't it, that you are  
14 not asserting claims against Mr. Hoskins for  
15 any role that he played in the 2003 transaction  
16 itself?

17 A. There are no claims asserted in  
18 the complaint against him, that is correct.

19 Q. And also you are not claiming that  
20 he should return any of the funds or disgorge  
21 the consideration that he received for his  
22 shares?

23 A. I guess to the extent that he's  
24 not in that count, yes, that would be correct.

25 Q. Count three of your amended

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1 complaint pertains to the Condor transaction,  
2 and I'm going to ask you some questions about  
3 that claim --

4 A. Okay.

5 Q. -- with respect to my clients  
6 beginning with Barry Hoskins.

7 A. Okay.

8 Q. And I don't know if you've got  
9 that in front of you, you might want to look at  
10 it.

11 A. I'm taking a look at it right now  
12 if I could.

13 Q. All right. I believe count three  
14 starts on page forty-two --

15 A. Uh-huh.

16 Q. -- and I'm looking specifically at  
17 Paragraph 177 where you claim as the plaintiff  
18 in this case that certain defendants, including  
19 defendant Hoskins and Lipson Wilson and Felix  
20 and Bevelhymer, knew or reasonably should have  
21 known at the time the company issued the ESOP  
22 notes that the Condor bond did not provide  
23 adequate security for the company's  
24 obligations.

25 A. Yes.

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1 Q. What facts do you have to support  
2 that contention with respect to Barry Hoskins,  
3 that he knew or should have known that Condor  
4 did not provide an adequate security?

5 A. Well, a couple things that I can  
6 think of as I'm sitting here.

7 One is I think when he went and  
8 got those surety bonds originally in, what my  
9 recollection is, the summer of 2004, that his  
10 insurance agent made him sign a statement that  
11 indicated that, you know, there were potential  
12 issues here. It's not an A.M. Best rated  
13 company and, therefore, you know, we want you  
14 to sign off as knowing that you're placing this  
15 insurance with a foreign -- whatever it was,  
16 Bahaman or Cayman Islands entity, that it's not  
17 A.M. Best rated.

18 And there's no indication that  
19 we've seen from the documentation that there  
20 was a lot of -- or anything much in the way of  
21 due diligence done with respect to Condor or  
22 its principal, this Harvey, is it Milam, at  
23 that point in time.

24 And there was a second item but it  
25 escaped my memory here presently. Just a

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1 second. Would you repeat his question to me  
2 again, please?

3 Q. Sure. What facts do you have to  
4 support the contention that Barry Hoskins knew  
5 or should have known that the Condor guaranty  
6 did not provide adequate security?

7 A. Oh. I think there should be some  
8 question arisen from the transaction itself in  
9 terms of, you know, the company was fully  
10 levered and Condor was issuing a guaranty  
11 without any collateral. If it has to pay off,  
12 how is it going to get paid? That might raise  
13 a question.

14 Q. What else?

15 A. Those are the two things I can  
16 think of presently.

17 Q. In Paragraph 177 you also allege  
18 that Barry Hoskins, Lipson Wilson, Felix, and  
19 Bevelhymer wasted and mismanaged corporate  
20 assets with respect to the Condor guaranty.  
21 What facts do you have to support that  
22 contention?

23 A. Again, I think with respect to  
24 Hoskins, we were previously talking about  
25 Hoskins, but with respect to Hoskins, you know,

18 (Pages 294 to 297)



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1 it's paying out the annual premiums under  
2 those -- for those guaranty bonds without  
3 really confirming whether or not this entity  
4 had an ability to perform. It was as if they  
5 were checking a box that was required by ERISA  
6 without confirming that, in fact, the entity  
7 had an obligation to inform, and, in fact, he's  
8 been put on notice that it's not an A.M. Best  
9 rated entity.

10 And I guess for him, if I recall  
11 my dates correctly, that would have  
12 been '04, '05. And then -- let me think '06,  
13 if I'm correct, and then he leaves as trustee  
14 in the '06 time frame and Lipson Wilson is in  
15 there before Reliance into '07, and it's in mid  
16 May of '07 that Condor Guaranty, the original  
17 entity, as I understand it, and there were  
18 apparently a couple -- two or three different  
19 entities became subject to a chapter 15  
20 bankruptcy proceeding in the United States.

21 And there's e-mail traffic  
22 indicating that the -- these individuals, at  
23 least -- I think it's Bevelhymmer and Lipson  
24 Wilson at least and maybe Felix as well, were  
25 aware of that by July of '07 and they went

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1 ahead and again without, it appears, much in  
2 the way of due diligence, any sort of -- that  
3 they went ahead and renewed on the bonds that  
4 year, dollars go out that year. And off the  
5 top of my head, I don't remember the amount of  
6 the dollars. It was in -- I believe it was in  
7 the hundreds of thousands.

8 And then in November of '07  
9 there's e-mail -- there's a McDermott Will  
10 e-mail which appears to indicate that there's a  
11 conversation with Lipson Wilson and McDermott  
12 about this issue, but then there's nothing  
13 beyond that until there are notes of, I think,  
14 an interview with Evolve where Evolve is  
15 interviewing Lipson Wilson.

16 And I think those notes indicate  
17 that she's informing them that there's a surety  
18 for those, you know, that there isn't an --  
19 basically that there's a surety. You know,  
20 they're ESOP notes but there's a surety for the  
21 ESOP notes. There's nothing in the notes that  
22 indicates that she has said, well, gee, there  
23 might be an issue with respect to a surety.  
24 That, I think, is in the December '07 time  
25 frame.

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1 And then it's not until I believe  
2 sometime in January of '08, and I talked about  
3 this earlier this morning, that it apparently  
4 becomes apparent to, I guess, Houlihan and the  
5 board and others that there's an issue and then  
6 there's kind of a mad scramble at that time to,  
7 one, I guess, for McDermott to analyze the  
8 situation and generate a memo and explain what  
9 the consequences are and what the company  
10 should do, and that takes from late January to  
11 sometime in late February, I think. And then  
12 there is a fair amount of e-mail traffic with  
13 respect to people trying to find alternative  
14 sureties. And ultimately no alternative  
15 sureties were obtained.

16 And then I think didn't they then,  
17 notwithstanding all of this, they reupped  
18 again, if I'm correct -- if I recall this  
19 correctly, in what would have been, what, the  
20 August, September, October time frame of 2008  
21 for another year.

22 So, you know, there's kind of this  
23 whole history going back to '04 where, you  
24 know, there are lots of folks going out of the  
25 ESOP in '04, a hundred, a hundred and ten

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1 million dollars' worth going out that year.  
2 The company clearly doesn't have the cash to  
3 pay for that. And, in fact, you know, under  
4 the ESOP provisions, as I understand them, and  
5 I admit that they're a tad bit confusing to me,  
6 you know, there's some portion over certain  
7 amounts that people are entitled to be paid off  
8 over a period of time. And so, you know, they  
9 know that they're going to have to issue notes  
10 and the notes get issued, it's like there  
11 isn't -- I don't see where there's due  
12 diligence done.

13 And it's like there's a mistake  
14 made, placed the insurance in the wrong place,  
15 and then kind of the reaction to that is we're  
16 just going to cover it up and ride it out and  
17 see what happens. And it ultimately comes to  
18 light, but it doesn't come to light until  
19 January of '08. Is that --

20 Q. When you say we're just going to  
21 cover it up, what do you mean by that?

22 A. Well, at least from the e-mail  
23 traffic, the -- you know, bankruptcy is a  
24 public event. You can go on a PACER website  
25 and search for bankruptcy for any entity. In

19 (Pages 298 to 301)

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1 fact, they had done a PACER search of Mr. Milam  
2 in '04, if Hoskins had done that or had  
3 McDermott or somebody do that, they would have  
4 seen that Milam and his wife filed bankruptcy  
5 back in the early '90s.

6 You know, I think if even  
7 rudimentary due diligence had been done on the  
8 principal and the company, there would have  
9 been some questions raised. Now, you know,  
10 that doesn't solve the problem obviously. They  
11 had the problem of being able to provide  
12 adequate security, but they didn't have any  
13 unencumbered assets left to provide the  
14 adequate security with.

15 And what they were essentially  
16 trying to do was get something for nothing, and  
17 they went ahead and got the something -- were  
18 paying for something, basically they paid, but  
19 there wasn't really any adequate security at  
20 the end of that. They didn't have a capacity  
21 to do that.

22 And, of course, in doing that, you  
23 know, my recollection of that, is that  
24 triggered defaults, of course, under their loan  
25 documents, and there's a waiver with respect to

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1 that in September '04 time frame.

2 And so, you know, there's this  
3 whole follow-on from that. I'm sorry, I maybe  
4 have gotten beyond your question. If you could  
5 go back.

6 Q. Well, the question was what -- you  
7 used the term they covered it up --

8 A. Oh.

9 Q. -- and my question was what did  
10 they do to cover it up?

11 A. I think -- yeah, I'm sorry, I got  
12 sidetracked on the bankruptcy piece.

13 Bankruptcy is in May of '07, and  
14 there's e-mail traffic indicating that -- I  
15 think -- again, I'd have to look at the e-mail,  
16 but I think it's Bevelhymmer and Lipson Wilson  
17 and maybe Felix may be in that string as well,  
18 but that there are rumors that they need to  
19 deal with with respect to Condor, an indication  
20 that there's an issue with respect to Condor  
21 from a solvency standpoint. And then there is  
22 a follow-on, as I said, in November of '07 with  
23 Lipson Wilson and Marsha Matthews on the same  
24 topic. And all this time Houlihan is out there  
25 running a sale process.

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1 And it doesn't appear -- from the  
2 e-mail traffic in late '08, it appears that the  
3 whole Condor issue comes as a surprise to  
4 Houlihan in their process, that that was not  
5 something that was disclosed. And as well, the  
6 notes, I think, from Mr. Lenoir of Evolve, or I  
7 believe Michael New maybe actually took the  
8 notes, but those notes of a December meeting,  
9 an initial meeting, with Miss Lipson Wilson  
10 don't indicate that there's an issue with  
11 surety and you would think that there might  
12 since it appears from the e-mail traffic that  
13 they were aware or should be aware that there  
14 was an issue with respect to Condor and the  
15 guaranty on the notes.

16 Q. Now, did you just refer to  
17 notes -- notes of a -- I'm sorry, I missed --  
18 what notes?

19 A. The ESOP notes are what we're  
20 talking about.

21 Q. Oh, I see. The ESOP notes you're  
22 suggesting --

23 A. No. The issue with respect to the  
24 guaranty on the ESOP notes.

25 Q. You're suggesting that the notes

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1 themselves should have revealed that there was  
2 a question about the financial health of  
3 Condor?

4 A. No, no.

5 Q. Okay.

6 A. No.

7 Q. I'm not understanding. I'm still  
8 focusing on what -- on your comment that the  
9 whole situation was covered up. I'm trying to  
10 understand what that means.

11 A. Well, again, bankruptcy occurs in  
12 May of '07. There's e-mail traffic in the  
13 company about potential issues with Condor I  
14 believe in July of '07. There may be some  
15 follow-on to that. I don't recall  
16 specifically. But then there is e-mail traffic  
17 between Marsha Matthews and Kim Lipson Wilson  
18 in November of '07 indicating --

19 Q. Where's the cover -- who should  
20 have been told -- to whom should this have been  
21 revealed that didn't get the message?

22 A. There's no indication that the  
23 board knows about it. There's no indication  
24 necessarily that upper management knows about  
25 it. And there's no indication that Houlihan

20 (Pages 302 to 305)

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<p>1 knows about it. And, in fact, the e-mail 2 traffic around the late January time frame all 3 seems to indicate that this comes as a surprise 4 to all of those constituencies.</p> <p>5 Q. So when you say it was hidden, 6 you're essentially saying that these officers 7 were hiding it from the board and from 8 Houlihan?</p> <p>9 A. That is what the e-mail traffic 10 appears to indicate.</p> <p>11 Q. Did you run across, in your 12 review, any documents indicating that Miss 13 Lipson Wilson or any of the other officers 14 named in the Condor count had sought advice of 15 counsel with respect to the Condor situation?</p> <p>16 A. Other than the -- well, yes, I did 17 is the answer. And that would be in the '07 -- 18 I'm sorry, November '07 time frame that I've 19 mentioned, there's an e-mail exchange, I 20 believe, between Miss Lipson Wilson and Marsha 21 Matthews and McDermott Will &amp; Emery.</p> <p>22 And then when the issue appears to 23 be disclosed to Houlihan -- and, again, I say 24 disclosed because if I recall the e-mail from 25 Houlihan correctly, they're somewhat</p>	<p>1 dis -- disregarded whatever advice they 2 received from counsel once this Condor issue 3 was raised with counsel?</p> <p>4 A. Well, I guess I'd have to look at 5 the timing precisely of the payment that was 6 made in the fall of '07 versus the e-mail 7 exchange in November of '07 for Lipson Wilson. 8 But my recollection is that the payment would 9 have -- maybe occurred before that.</p> <p>10 I think that my recollection of 11 the Marsha Matthews e-mail was cautionary in 12 nature, and it indicated that there had maybe 13 been a telephone conversation preceding the 14 e-mail and, therefore, you know, whether or not 15 when that payment was made -- in terms of 16 precisely answering your question, I'd have to 17 know precisely when the payment was made, and I 18 presume we might have that information 19 somewhere.</p> <p>20 Q. Well, why don't we do this. Why 21 don't we hold off and when we take a break, 22 I'll ask you to look at several of these 23 documents that you've mentioned.</p> <p>24 A. Okay.</p> <p>25 Q. But are you suggesting by your</p>
Page 307	Page 309
<p>1 complaining that they had asked the company 2 about this earlier on and either didn't get an 3 answer or got a different answer and then are 4 somewhat perturbed that they're finding out 5 about it now at the end of January.</p> <p>6 And then there's a fair amount of 7 follow-on, I think, with legal counsel at 8 that -- from that point onward in terms of the 9 issue and, you know, what's to be done with the 10 current situation with the surety. The counsel 11 undertakes, I think, to -- you know, they 12 run -- they run the docket so they run the 13 PACER search at that juncture and find out 14 what's going on in the case, and they look into 15 stuff and I think the conclusion, if I recall 16 the -- again, Mr. New's notes from the Chicago 17 meeting in February of 2008, the surety is 18 discussed, and my recollection is that the 19 McDermott people indicate there that they don't 20 think that it's, you know, viable, basically 21 that the surety -- that there isn't going to be 22 a recovery, if I recall those notes correctly, 23 or it's not in a position to perform.</p> <p>24 Q. Do you have any evidence that any 25 of the officers who you've named in this count</p>	<p>1 answer that you believe counsel, Marsha 2 Matthews, advised the officers, Miss Lipson 3 Wilson or others, not to make any further 4 premium payments to Condor?</p> <p>5 A. I don't think that's what the 6 e-mail said, no.</p> <p>7 Q. Okay.</p> <p>8 A. I think it was to be careful to 9 make certain there was adequate security was my 10 recollection, but I could be recalling the 11 e-mail wrong.</p> <p>12 Q. So the relation -- so the timing 13 of the e-mail with Marsha Matthews and the 14 payment of the premium in 2007 doesn't 15 really -- isn't really germane, is it, to the 16 question of whether Miss Lipson Wilson or 17 others followed the advice of counsel?</p> <p>18 A. Again, if I'm recalling the e-mail 19 correctly, maybe not; but I'm trying to be 20 responsive to your question to make sure I -- 21 you know, from what I can recall, that those 22 are the things -- that was the only instance in 23 which I'm aware of that counsel was consulted 24 with respect to that. Now, what the substance 25 of the conversation was, I don't know</p>

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1 precisely.

2 Q. All right. I started off focusing  
3 this question on Barry Hoskins and then, of  
4 course --

5 A. Yes.

6 Q. -- we've inevitably gone over to  
7 some of the -- others of my clients. But with  
8 respect to Karen Felix, let's just take her  
9 individually if we could for a moment. What  
10 facts do you have to indicate -- excuse me --  
11 that she breached her fiduciary duty to Antioch  
12 with respect to the Condor guaranties?

13 A. Well, as CFO, she was the top  
14 person financially in the company, as I  
15 understand it, and that -- you know, head of  
16 that finance team and that Bevelhymer reported  
17 to her. And I'm not certain the extent -- I'd  
18 have to go back and look at the e-mails to the  
19 extent to see that she was copied, but  
20 certainly one would expect that she would be  
21 aware of payments going out to -- as a CFO of  
22 that magnitude to the ESOP notes -- to the  
23 surety in respect of the Condor payments on the  
24 ESOP notes.

25 So, I mean, I think that's where

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1 she comes into that piece. And I guess the  
2 other one was the -- who all was on the e-mail  
3 in July where there's first an issue raised  
4 with respect to -- or appears to be that the  
5 company has become aware of an issue with  
6 respect to Condor July of '07. I don't recall  
7 if she was in that string or not. We'd have to  
8 look at the e-mail.

9 But, again, if she is aware of  
10 that and if she's, you know, involved in the  
11 sale process and/or interfacing with Houlihan,  
12 the issue is whether or not, you know, one, the  
13 board and Houlihan don't appear to know about  
14 any of this stuff until late January of 2008.  
15 And it does appear that these officers, one or  
16 more of them, may or should have known about it  
17 in July of 2007, about six months prior.

18 Q. Same question then with respect to  
19 Steve Bevelhymer, what did he do, do you  
20 believe, to breach his fiduciary duty with  
21 respect to Condor?

22 A. My recollection of that is, again,  
23 he may well have been on or involved in the  
24 e-mail string or e-mail that pertained in  
25 July '07, and I thought he was the individual

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1 who authored -- you know, that there's an  
2 e-mail with respect to him actually doing the  
3 payment in '07 for Condor knowing that there's  
4 a potential issue there.

5 And then, again, you know, he's an  
6 officer. He knows what's going on here. These  
7 folks were involved in the sale process. The  
8 finance team was copied on various things  
9 involved in the sale process. They put in  
10 their two cents, I think, in terms of a  
11 response to -- in November of '07 they put in  
12 their two cents on a response to Sun that we  
13 can't figure out why or, you know, what  
14 happened with that.

15 So, I mean, they're involved and  
16 engaged in the sale process and, you know, this  
17 is a material piece of information for that.  
18 Now, you know, it's not a good piece of  
19 information from the company standpoint, I  
20 suppose, but it's certainly a material piece of  
21 information that Houlihan indicates in late  
22 2008 they've been requesting and haven't gotten  
23 and are surprised to find out about at the end  
24 of 2008.

25 Q. Other than the payments of

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1 premiums that you have indicated I think you  
2 believe constitute a waste of corporate assets,  
3 was the company, Antioch, damaged in any other  
4 way as a result of the Condor Guaranty issue?

5 A. Well, I mean, I think I've  
6 indicated earlier, obviously it -- it appeared  
7 to have an adverse impact on the sale process.  
8 There were certain -- a fair amount that goes  
9 on post the two -- you know, the January 2008,  
10 for lack of a better term, discovery of this at  
11 least among Houlihan and the board and others.

12 It kind of -- it appears that it  
13 changes an approach that Candlewood is taking  
14 or at least, you know, nixes that out, not that  
15 that approach was necessarily going to fly  
16 anyway.

17 And then what ensues is a fair  
18 amount -- you know, legal expense otherwise  
19 dealing with the issue in two thousand -- in  
20 February of 2008.

21 Q. I didn't hear one of the words you  
22 just used. There was what expense?

23 A. Legal expense. I'm sorry.

24 Q. That's all right.

25 A. Legal expense with McDermott Will

22 (Pages 310 to 313)



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1 & Emery in assessing the situation and  
2 generating a memo with respect to it and then  
3 going out and canvassing sources for -- over a  
4 period of several weeks, I think, trying to  
5 find alternative security.

6 And then as I sit here, I think  
7 that is -- well, I mean, I mentioned earlier,  
8 obviously, the potential, you know, ESOP ERISA  
9 issues which if I recall the e-mail exchange  
10 correctly, I think that there is references  
11 to -- and I'm a little fuzzy, but in that time  
12 frame after which it becomes kind of generally  
13 known within the company and the board and  
14 Houlihan, January of 2008 onward, there's a  
15 concern, and maybe it's in the notes from the  
16 Chicago meeting. And maybe it's the ESOP  
17 trustee's attorney that raises the issue about  
18 how if we file bankruptcy without these things  
19 adequately secured, it's going to -- you know,  
20 we'll lose -- the IRS will be all over it sort  
21 of thing. That's my recollection of that. I'm  
22 sure that's not the wording.

23 But I have a recollection that  
24 there would -- the consequences of this being  
25 discovered in a bankruptcy became a concern

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1 and, you know, potentially another reason for  
2 those who don't want to go the bankruptcy  
3 change of control approach to say, hey, wait a  
4 minute, we've got this issue now with the ESOP  
5 where we're not, you know, adequately secured  
6 and what's going to happen when we file  
7 bankruptcy and that -- since the light of that,  
8 what will the IRS do. That piece comes to  
9 mind.

10 Let me think. I think that's all  
11 I can -- can think of presently.

12 Q. I think you indicated earlier this  
13 morning that the ESOP ERISA issues, the  
14 potential liability to the company in that  
15 respect, never -- never came to pass, correct?

16 A. That's my understanding, yes.

17 Q. Now, with respect to what  
18 appeared, you said, to have had an -- it  
19 appeared to have had an adverse impact on the  
20 sale process, and then you mentioned a couple  
21 of concerns about the IRS and whatnot, is there  
22 any way that you, from the evidence you are  
23 aware of, can say that it's more likely than  
24 not that a sale -- an asset sale, 363 or  
25 otherwise, was thwarted or delayed because of

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1 the Condor issue?

2 A. Well, again, to the extent that  
3 there are -- that that's raised as an issue by  
4 one of the constituents in the process as being  
5 a reason for not filing. Beyond that, you  
6 know, that's, you know -- that was something  
7 that goes into the mix, the Condor -- the  
8 failure to provide adequate security is  
9 something that, you know, appears, to me from  
10 the documents and the notes, to be in the mix.

11 Q. But you don't know whether or not  
12 the absence of the Condor issue in the mix  
13 would have led to a different decision with  
14 respect to --

15 A. Yeah --

16 Q. -- a sale?

17 A. -- I don't know that anybody knows  
18 the answer to that.

19 Q. So in that respect, isn't it true,  
20 Mr. Miller, that it's simply speculation to say  
21 that the problem with the Condor guaranty  
22 caused damage to the company with respect to  
23 the sale process because we just really don't  
24 know; isn't that right?

25 A. Well, I would say it appears to me

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1 to have had an impact.

2 Q. Something other than what you've  
3 already articulated --

4 A. No.

5 Q. -- that it went into the mix?

6 A. That's my -- I think I've -- yeah,  
7 I think I've answered that one.

8 Q. But if we -- if we take the Condor  
9 issue out of the mix --

10 A. Uh-huh.

11 Q. -- there's no way to know, is  
12 there, whether things would have worked out  
13 differently with respect to the sale process?

14 A. I suppose not. We don't know.

15 Q. So we have the potential ERISA  
16 issues that didn't come to pass. We have a  
17 potential effect on the sale process which  
18 you've just indicated we can't really know  
19 whether the Condor issue made a difference in  
20 the end in the sale process. Are we left then  
21 with the legal expenses to the law firm and the  
22 premium payments to Condor as the only real  
23 damages that are nonspeculative in your claim?

24 A. Well, I think that as you roll  
25 them out, those are the ones that we can put

23 (Pages 314 to 317)



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1 numbers on. And with respect to all of the  
2 damages, I defer to whatever expert testimony  
3 we might ultimately obtain with respect to  
4 that, and I don't know, you know, whether we  
5 would or wouldn't. But beyond that, I think  
6 you -- as I sit here today, I think you've  
7 defined the universe.

8 Q. Let me stick with this Condor  
9 topic for just a little bit longer. Assuming  
10 for the sake of discussion that you are correct  
11 in your contention that Barry Hoskins should  
12 have known -- knew or should have known when he  
13 initially purchased the Condor guaranty that it  
14 was inadequate security, assuming that that's  
15 true, what alternatives did he have at that  
16 point that you're aware of to obtain adequate  
17 security for the ESOP notes?

18 A. Well, I think he could have  
19 obtained adequate security for the ESOP notes.  
20 You know --

21 Q. I'm asking how.

22 A. -- maybe that's not from the  
23 company. Maybe that's from somebody else.  
24 Maybe that's from him saying to the board, hey,  
25 you know, all these dollars have gone out,

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1 we're all loaded up with debt, we've got this  
2 issue with the ESOP, all these people are  
3 leaving, we've got a problem here and we've got  
4 to do something about it and we've got to make  
5 certain that we've got adequate security or the  
6 entire reason, the financial reason behind why  
7 you do the ESOP transaction, which was we're  
8 going to have all these tax savings over the  
9 next ten years, is going to go away if we don't  
10 have adequate security because the ESOP isn't  
11 going to be qualified any longer. It's not  
12 going to be a tax exempt entity anymore.

13 It's a huge risk. It's a huge  
14 issue. It's something that, you know, just  
15 calling up your insurance agent, having him  
16 find you somebody in the Caymans and signing  
17 off that you don't mind that it's not an A.M.  
18 Best rated thing doesn't strike me as being a  
19 prudent thing for a CFO to do, and it strikes  
20 me that that would breach the CFO's duties to  
21 the company.

22 And I don't see where this is -- I  
23 mean, I -- maybe there are board minutes where  
24 it's mentioned that they do this Condor thing,  
25 but I don't see that it's really dug into

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1 anywhere from the documents that we have, that  
2 he does some extensive search, that he does any  
3 due diligence, that he goes up the chain to  
4 anybody and says, hey, you know, we've got a  
5 problem here. We've got to deal with this.  
6 So, you know, that's kind of my impression of  
7 it.

8 Q. Okay. I understand your  
9 impression. Other than running a flag up the  
10 pole, are you aware of any other security that  
11 Mr. Hoskins or any of the officers of the  
12 company could have obtained at the time the  
13 Condor guaranty was first purchased that would  
14 have constituted adequate security?

15 A. You know, he could have had the  
16 Morgans or somebody else guarantee the notes if  
17 they wanted to. I mean, there are other  
18 sources of funds he could go to. In terms  
19 of -- if you're asking about the corporate  
20 assets, no, those are fully lien up. I've  
21 previously testified to that. From the balance  
22 sheet and from every -- you know, from the ESOP  
23 transaction, those appear to be fully lien up.  
24 There's nothing that the corporation has  
25 available to offer and -- you know, unless the

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1 banks would have been willing to do something  
2 on that score.

3 But there's no indication that,  
4 you know, negotiations were had or otherwise.  
5 The company appears to have gone and done this,  
6 issued the notes and obtained the bonds, and  
7 they did it in violation of the loan documents  
8 and then needed a waiver of the loan documents  
9 in September to be able to get out from under  
10 that. So, yeah, from a -- it doesn't appear to  
11 me as if the entire situation was handled at  
12 all appropriately.

13 Q. Well, and I'm -- maybe I'm just  
14 not hearing you. I hear you raising a lot of  
15 questions, but I'm still not -- I guess you did  
16 mention the possibility of having the Morgans  
17 secure the notes. Other than -- was that a  
18 serious suggestion on your part that that was  
19 an option?

20 A. You're asking for the realm of any  
21 possibility. I mean, I made it clear, I think,  
22 that I don't -- it didn't appear to me that  
23 there are any unencumbered assets of the  
24 corporation --

25 Q. Okay.

24 (Pages 318 to 321)

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1 A. -- that he could have offered up.  
2 So, you know, beyond that -- you know, but it's  
3 a large enough issue that maybe the input of  
4 the board or others in management might have  
5 been a prudent thing to obtain.

6 Q. Is it fair to say, Mr. Miller, as  
7 you sit here today, you're not aware of any  
8 adequate security that could have been obtained  
9 at the time the Condor guaranty was first  
10 purchased?

11 A. Again --

12 MS. ANDREW: Objection.

13 THE WITNESS: I think I've answered  
14 that.

15 BY MR. KLINGLER:

16 Q. Well, you've answered why you  
17 think it was a breach of fiduciary duty to not,  
18 as a understand it, raise the issue, maybe  
19 bring it to the board or ask questions, but I  
20 haven't heard you -- unless I've missed it, I  
21 haven't heard you -- other than the Morgans  
22 guaranteeing it, I haven't heard you suggest a  
23 specific alternative.

24 A. Go to the banks.

25 MS. ANDREW: Objection to the extent

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1 your -- the witness is not here as any expert in  
2 financing of adequate security for ESOP notes so  
3 your question is asking a hypothetical. It's  
4 asking for an expert opinion. He's given you his  
5 best answer.

6 MR. KLINGLER: Well, I'm not sure  
7 that's true but that's what I'm trying to find  
8 exactly what the answer is and what the full  
9 extent of his answer is.

10 BY MR. KLINGLER:

11 Q. So here's what I -- I understand  
12 your position, I believe, that Barry Hoskins  
13 and some of my other clients breached their  
14 fiduciary duty with respect to the Condor note.  
15 My question is, given the circumstances with  
16 respect to Barry Hoskins specifically, given  
17 the circumstance that he was in, are you aware  
18 of any alternative adequate security that he  
19 could have obtained other than the Condor  
20 guaranty?

21 MS. ANDREW: Same objection. It's  
22 hypothetical and it calls for an expert opinion.  
23 You can answer to the extent you're able.

24 MR. KLINGLER: I'm not asking for an  
25 opinion. I'm just asking if he knows any facts.

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1 THE WITNESS: Well, I mean, I think  
2 it goes to the premise of, gee, we did this  
3 transaction less than a year ago that's taken, you  
4 know -- liened up all the company's assets and  
5 left us with no way to have adequate security, and  
6 doing something that can at least check the box is  
7 better than doing nothing is not the right answer  
8 in my view, but it appears to be what Mr. Hoskins  
9 did.

10 I mean, I've indicated before, I'm  
11 not aware of any company assets that were  
12 available to provide adequate security. They were  
13 unable, I think, legally to provide adequate  
14 security through stock of the company to the  
15 extent that might have been available. And so,  
16 you know, that's tapping -- you know, without bank  
17 consent on something or without some third party  
18 coming in and providing the adequate security, you  
19 know, those would have been the other options.  
20 There's no indication that he pursued any of those  
21 options.

22 But clearly, it does not appear that  
23 the company had an ability to provide the adequate  
24 security from its assets because they were all  
25 encumbered as a result of the ESOP transaction.

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1 BY MR. KLINGLER:

2 Q. So a letter of credit or something  
3 else issued by the company wouldn't have helped  
4 the situation, correct?

5 A. Again, without bank involvement or  
6 concept, which appears to have not been  
7 obtained ahead of time since it precipitated a  
8 breach in the necessary waiver, no, I mean, it  
9 doesn't appear that there were unencumbered  
10 assets available to offer that adequate  
11 security.

12 Q. And do you have any evidence to  
13 indicate that the banks would have been willing  
14 to do whatever they needed to do to permit the  
15 company to come up with adequate security to  
16 secure the ESOP notes?

17 A. Well, we --

18 MS. ANDREW: Objection.  
19 Hypothetical.

20 THE WITNESS: They granted the  
21 waiver, but, you know, we'll never know since it  
22 appears that they were never asked.

23 BY MR. KLINGLER:

24 Q. So I've asked the question several  
25 times now and I just want to make sure, do you

25 (Pages 322 to 325)

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<p>1 have any other answer to my question about the</p> <p>2 other -- the alternatives to adequate security</p> <p>3 that Barry Hoskins had available to him, to</p> <p>4 your knowledge?</p> <p>5 A. I think I've listed out the ones</p> <p>6 that I think are -- were available.</p> <p>7 Q. My last line of questioning was</p> <p>8 directed to Mr. Hoskins. With respect then</p> <p>9 later on to Kim Lipson Wilson, Karen Felix,</p> <p>10 Steve Bevelhymer, are you aware of any</p> <p>11 alternative -- alternative sources of adequate</p> <p>12 security that might have been available to them</p> <p>13 later on after the first round of notes were</p> <p>14 secured?</p> <p>15 A. I think my answer with respect to</p> <p>16 them would be similar, if not the same, as my</p> <p>17 answer with respect to Mr. Hoskins. And,</p> <p>18 again, it doesn't appear that they undertook an</p> <p>19 effort to try to find or pursue or do any sort</p> <p>20 of alternatives until the issue was surfaced</p> <p>21 with Houlihan in late January of 2008.</p> <p>22 I mean, there was no ability in</p> <p>23 the company in terms of unencumbered assets</p> <p>24 available to provide the adequate security, to</p> <p>25 my knowledge, or, you know, based upon what</p>	<p>1 out --</p> <p>2 A. No, no, no.</p> <p>3 Q. -- what did they do to allow the</p> <p>4 Morgan family to pursue recapitalization</p> <p>5 alternatives?</p> <p>6 A. I mean, I think similar to maybe</p> <p>7 some of the other board members, but they being</p> <p>8 in the better position to have really the most</p> <p>9 current information with respect to the</p> <p>10 company's finances and its sales and its</p> <p>11 projections, that, you know, they saw or should</p> <p>12 have seen fairly early on in the sale</p> <p>13 process -- in the April, May time frame of '07,</p> <p>14 there is a fair amount of e-mail traffic</p> <p>15 concerning the company's sales projections and</p> <p>16 Mr. Bevelhymer is involved on that. I believe</p> <p>17 Miss Felix is. I'm not certain with Miss</p> <p>18 Lipson Wilson but she may well have been, with</p> <p>19 respect to those sales projections and, you</p> <p>20 know, how valid those are and these are the</p> <p>21 projections that I think the company is coming</p> <p>22 up with for Houlihan to use to market the</p> <p>23 company.</p> <p>24 And, you know, this is kind of</p> <p>25 where it starts, but there -- I can recall</p>
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<p>1 I've seen in the documents. So, you know,</p> <p>2 there would have had to have been other avenues</p> <p>3 pursued and it doesn't appear that they were.</p> <p>4 Q. You're not aware of any that would</p> <p>5 have been successful in your -- in your view?</p> <p>6 A. I have no way of knowing if they</p> <p>7 weren't ever pursued.</p> <p>8 Q. Let me switch to count six, which</p> <p>9 is your claim for breach of fiduciary duty with</p> <p>10 respect to the sale process. You've named</p> <p>11 three of my clients in that count, Kim Lipson</p> <p>12 Wilson, Karen Felix, and Steve Bevelhymer.</p> <p>13 In Paragraph 193 of the amended</p> <p>14 complaint, you indicate that the above named</p> <p>15 defendants, who include defendants other than</p> <p>16 my clients, the above named defendants allowed</p> <p>17 the Morgan family to pursue or failed to</p> <p>18 prevent the Morgan family from pursuing</p> <p>19 recapitalization alternatives, although the</p> <p>20 board was paying Houlihan to find a purchaser.</p> <p>21 My question is with respect to Kim</p> <p>22 Lipson Wilson, Karen Felix, Steve Bevelhymer,</p> <p>23 to save time I'll just lump them together --</p> <p>24 A. Okay.</p> <p>25 Q. -- unless you need to divide them</p>	<p>1 specifically a Bevelhymer e-mail saying -- you</p> <p>2 know, looking at the situation and saying, you</p> <p>3 know, I'm absolutely convinced the company</p> <p>4 needs to be sold.</p> <p>5 And there are also e-mails between</p> <p>6 him and Richard Wiser, and Wiser is the one</p> <p>7 who's doing the projections, now they've got</p> <p>8 somebody who's doing projections using an</p> <p>9 econometric model, and, you know, Wiser and he</p> <p>10 are back and forth about how, you know, there</p> <p>11 are various issues, the sales decline, you</p> <p>12 know, that there appears to be no end in sight</p> <p>13 and Wiser is making the point that, you know,</p> <p>14 there are various initiatives that need to be</p> <p>15 undertaken but the company doesn't have the</p> <p>16 capacity to do that.</p> <p>17 It doesn't have the financial</p> <p>18 wherewithal or the capacity to do that. It has</p> <p>19 been totally leveraged and overleveraged since</p> <p>20 the 2003 ESOP transaction and that continued,</p> <p>21 you know, to the very end.</p> <p>22 And so there is, you know,</p> <p>23 conscious knowledge among those folks that the</p> <p>24 company needs to be sold; and Bevelhymer is in</p> <p>25 on this and I think Felix may well have been as</p>

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<p>1 well, and this is in the May, June, July time  2 frame of '07. And, you know, surprise,  3 surprise, with those numbers going where  4 they're going and continue to be going where  5 they're going and, you know, the initial  6 indications of value from the initial Houlihan  7 process which was geared toward a -- you know,  8 a company that was not a distressed company,  9 they were looking for buyers that were  10 interested in a company that's not distressed,  11 the initial indications of value come back and  12 say, you know, there's not enough to pay the  13 debt. And we switch over to then in the  14 September, October time frame of it being more  15 in the nature of a distressed-type sale from  16 the Houlihan perspective. And then Mr. Morgan  17 comes in at that juncture in the November time  18 frame with a Candlewood proposal and we are  19 now, you know, several months beyond when  20 Bevelhymmer is saying the company needs to be  21 sold.</p> <p>22 And we then continue in the  23 process, much of which I think I talked about  24 yesterday, which is this -- the board not  25 pursuing the sale at the behest of Mr. Morgan.</p>	<p>1 they know that the company and the board is  2 pursuing a -- are not moving quickly to pursue  3 the process, they're moving to simply let  4 things ride while Mr. Morgan is given more and  5 more time to try to come up with some other  6 sort of deal. And I understand that we're out  7 of tape.</p> <p>8 Q. We've got to go off the record.  9 A. So --</p> <p>10 THE VIDEOGRAPHER: We're off the  11 record.  12 (Pause in proceedings.)  13 THE VIDEOGRAPHER: We're on the  14 record.</p> <p>15 BY MR. KLINGLER:  16 Q. Mr. Miller, during a break we  17 identified at least three of the documents that  18 you had referred to earlier in response to my  19 questioning that pertained to the Condor issue,  20 and they are exhibits number 731, number 108,  21 and number 741. I'm not asking you to  22 stipulate that those are the only documents  23 that pertain to the issue, but are those -- are  24 those three of the documents that you've pulled  25 up in the -- during the break?</p>
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<p>1 Q. You're aware, aren't you, that my  2 clients were not board members?</p> <p>3 A. Oh, I understand --</p> <p>4 Q. Okay.</p> <p>5 A. -- but they are officers of the  6 company.</p> <p>7 Q. True. So --</p> <p>8 A. Okay. And --</p> <p>9 Q. You're answering the question of  10 how did they allow -- how did they allow the  11 Morgan family to pursue recapitalization,  12 that's the question you're answering?</p> <p>13 A. By -- and I apologize, it's a long  14 way of getting to kind of the background in my  15 mind of what they knew based upon what the  16 documents are and getting to the place where  17 the Morgans get involved. And again, trying  18 not to -- trying to keep the context in here.</p> <p>19 That then as it rolls forward  20 through the November through, you know, May of  21 2008, November '07, May of 2008 time frame, you  22 know, you see these people participating in  23 this process. This process where they've  24 determined early -- you know, back in the late  25 spring of '07 the company needs to be sold, but</p>	<p>1 A. Yes, although we have not pulled  2 up 741 yet for me to see it, but we think that  3 that's the number.</p> <p>4 Q. Okay.</p> <p>5 A. But the other two I've definitely  6 looked at.</p> <p>7 Q. Let me move on here for the sake  8 of time --</p> <p>9 A. Sure.</p> <p>10 Q. -- and go back to the question --  11 to the count we were discussing before the  12 break, count six, breach of fiduciary duty with  13 respect to the sale process.</p> <p>14 A. Yeah.</p> <p>15 Q. And I'll ask you with respect to  16 my clients named in that count, Kim Lipson  17 Wilson, Karen Felix, and Steve Bevelhymmer, are  18 you aware of any things -- anything or things  19 that they could or should have done to prevent  20 the recapitulation -- I'm sorry, the  21 recapitalization efforts that are the subject  22 of this count?</p> <p>23 A. From what I've seen, I mean, it  24 seems to me that they should have been more  25 adamant with the board about the need to sell</p>



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<p>1 the company. If anybody knew that the value 2 was declining over time, it was these folks. I 3 mean, this is the CFO, it's the treasurer. 4 These people were, you know, aware that the 5 sale projections -- you know, the econometric 6 models in the spring were considerably, you 7 know, less positive than what the -- you know, 8 what management's projections were from earlier 9 that year, that there needed to be adjustments 10 downward in those things and they were the ones 11 that were in the best position and had the most 12 current information, I would think, with 13 respect to the company's financial position. 14 And the treasurer is saying the 15 company needs to be sold and, you know, during 16 the midst of this, of course, they're 17 negotiating and asking for stay bonuses, which 18 they obtained, and payments on which, as I 19 understand it, were made in December of '07, 20 and, you know, they are then participating -- 21 there are e-mails with Steve Bevelhymmer I know 22 in the -- I think it's in the March time frame 23 where -- and I mentioned this one yesterday, I 24 think, where Mr. Morgan is complaining to him 25 that he -- he's not getting information from</p>	<p>1 actions that you just referred to, did that 2 action -- did that end up making a difference 3 in the board's actions? 4 A. From the e-mail traffic, it 5 appears that it did. That they didn't go with 6 Asha's -- Asha -- I'm sorry for the 7 pronunciation -- Asha's guess. 8 Q. Are you aware of any facts with 9 respect to Kim Lipson Wilson, Karen Felix, or 10 Steve Bevelhymmer that support the contention 11 that it's more likely than not that the board 12 would have decided not to pursue the 13 recapitalization efforts if any of these 14 officers had spoken up or done more than you 15 think they've done? 16 MS. ANDREW: Objection. 17 Hypothetical. 18 THE WITNESS: Yeah, again -- you 19 know, that's purely hypothetical. We will never 20 know because the e-mail traffic indicates that 21 they did not speak up. 22 BY MR. KLINGLER: 23 Q. So we'll never know whether their 24 failure to speak up made any difference at all 25 in the end, will we?</p>
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<p>1 Mr. Bevelhymmer I think with respect to a 2 recapitalization because Mr. Bevelhymmer is busy 3 giving -- you know, getting information 4 together for Houlihan for the 363 process and, 5 you know, Mr. Morgan is unhappy about that. 6 And, you know, I think that these 7 people knew that the company -- or should have 8 known that the company needed to be sold, was 9 not increasing with value with time, and I 10 don't see anything in the e-mail traffic of 11 them going to the board and saying, hey, this 12 needs to be sold, this is an issue. 13 When Richard Wiser thought that 14 there were issues with respect to Asha's guess, 15 the sales projections that she came up with in 16 the May 2007 time frame, he went to Alan Luce, 17 a board member, and he went to Nancy Blair who 18 was on the board then to say, hey, I'm 19 concerned about this. And he also went to Asha 20 on that. And there's e-mails where in other 21 circumstances, other corporate officers stepped 22 up and said, hey, you know, there's an issue 23 here to the board and made the board aware of 24 that. 25 Q. With respect to Mr. Wiser's</p>	<p>1 A. Well, and again, I think -- 2 Q. Well, will we? Isn't that what 3 you just said. Just to save time, isn't that 4 what you just said? 5 MS. ANDREW: Objection 6 BY MR. KLINGLER: 7 Q. We'll never know? 8 A. We can't know because they didn't 9 speak up and our issue is that they didn't 10 speak up. 11 Q. But we don't know whether that 12 damaged the company, do we? 13 A. Well, clearly the company not 14 doing a sale process within the time frames 15 that were permitted here damaged the company 16 from the Trust point of view. So -- 17 Q. Well, I don't want to go around in 18 circles here or beat a horse; but my clients, 19 the officers, did not vote on any issue with 20 respect to recapitalization of the sale 21 process, did they? 22 A. Not that I'm aware of, no. 23 Q. Can you identify, Mr. Miller, any 24 sale -- asset sale or other transaction that 25 probably would have gone through were it not</p>



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<p>1 for the recapitalization efforts of the Morgan 2 family?</p> <p>3 MS. ANDREW: Objection. Vague and a 4 hypothetical.</p> <p>5 MR. KLINGLER: Well, it's no more 6 hypothetical than the claim, I guess. That's what 7 I'm trying to get at here.</p> <p>8 BY MR. KLINGLER:</p> <p>9 Q. Is there anything behind the claim 10 other than speculation?</p> <p>11 A. The J.H. Whitney proposal and 12 letter of intent in May 2008 which the company 13 was moving forward to present in a Section 363 14 bankruptcy sale at some time presumably in June 15 while at the same time both Marlin and Monomoy 16 were still interested in the company.</p> <p>17 So you had a situation where 18 you've got a party that's submitted a letter of 19 intent. It's not conditional on financing. 20 There's some -- at that juncture, I'd have to 21 look back, but the extent to which due 22 diligence was necessary.</p> <p>23 But, I mean, I think they were 24 talking time frames at that juncture that were 25 relatively short, and the indication is that</p>	<p>1 that sale probably would have gone through if 2 my clients hadn't breached their fiduciary duty 3 as you suggest?</p> <p>4 A. Well, originally the question was 5 phrased as if the sale -- I thought if the sale 6 process hadn't been delayed, that that was the 7 issue in terms of the breach of the fiduciary 8 duty. And Kim Lipson Wilson was the one who 9 voted to take out the board, right, in the 10 midst of that? So --</p> <p>11 Q. Well, she was --</p> <p>12 A. Yeah, that's the one.</p> <p>13 Q. She was a minority vote in it, 14 yes.</p> <p>15 A. Okay. But she participated, and 16 that's, you know -- that's what we've --</p> <p>17 Q. You're saying that that initial -- 18 that J.W. -- is it J.H. --</p> <p>19 A. J.H. Whitney.</p> <p>20 Q. -- J.H. Whitney sale, in your 21 mind, probably would have gone through if Kim 22 Lipson Wilson had not voted as she did?</p> <p>23 A. I'm saying that the company was 24 set up to a place where -- and were pursuing a 25 363 sale process with three potential</p>
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<p>1 Marlin and Monomoy were still out there and 2 interested. So what you're setting it up for 3 is a three-party auction, the starting place is 4 like fifty-two or fifty-four million dollars.</p> <p>5 Q. My question is just this -- I 6 mean, I'd love to spend the time listening to 7 your theory, and we've heard a lot of it and I 8 don't mean to be snide here, but my question 9 was simple. Can you identify any sale that 10 probably would have occurred if Kim Lipson 11 Wilson, Karen Felix, and/or Steve Bevelhymer 12 would have not breached their fiduciary duty of 13 the company with respect to the sale process?</p> <p>14 MS. ANDREW: Objection.</p> <p>15 THE WITNESS: I think I just answered 16 that question.</p> <p>17 BY MR. KLINGLER:</p> <p>18 Q. Okay. Was the answer yes or no?</p> <p>19 MS. ANDREW: It wasn't a yes or no 20 question.</p> <p>21 THE WITNESS: It's a hypothetical 22 question.</p> <p>23 BY MR. KLINGLER:</p> <p>24 Q. Well, can you identify a sale that 25 probably would have gone through? You think</p>	<p>1 interested bidders and a fifty-two, fifty-four 2 million dollar starting place. One of those 3 three in that process most likely would have 4 come out had the process gone forward, again 5 speaking what might have happened had, you 6 know, Miss Lipson Wilson not voted to take out 7 the board and forestall that process.</p> <p>8 Q. And with respect to Karen Felix 9 and Steve Bevelhymer on that issue --</p> <p>10 A. On that issue --</p> <p>11 Q. -- do you fault them on that 12 issue?</p> <p>13 A. I fault them on having not spoken 14 up to the board with respect to the need to 15 pursue the 363 process sooner. And since 16 Marlin, Monomoy, and J.H. Whitney were 17 interested in the mix, from -- you know, from 18 what I can tell early, you know, '08, February 19 at least onward, you know, a sale could well 20 have occurred. Again, we're talking what might 21 have occurred. It could well have occurred 22 much sooner.</p> <p>23 Q. You don't know whether it would?</p> <p>24 A. Nobody does, right, because --</p> <p>25 Q. Right.</p>

<p style="text-align: right;">Page 342</p> <p>1 A. -- people breached their fiduciary 2 duties from the Trust position. 3 Q. But we don't know the real result 4 of that, do we? 5 A. Well, yeah, we do. We know where 6 the company ended up, in bankruptcy, and we 7 know that there are a lot of beneficiaries of 8 the trust who remain unpaid while a lot of 9 creditors have got paid. 10 Q. Let me switch quickly to your 11 claim in count eight, breach of fiduciary duty 12 with respect to the sale process, and this is 13 the sale process -- I believe refers to the 14 sale process after the board had been 15 terminated and Mr. Morris had been appointed to 16 the board? 17 A. Correct. 18 Q. What evidence do you have that 19 Robert Morris rejected the Whitney proposal? 20 A. Well, switching out the board was 21 a rejection of the Whitney proposal. 22 Q. Well, he didn't -- he didn't -- 23 A. Right. 24 Q. -- do that, right? 25 A. Well, I mean, he became a member</p>	<p style="text-align: right;">Page 344</p> <p>1 Q. Was there ever a subsequent 2 Whitney proposal that summer? 3 A. It was my understanding that there 4 was one later but at a much -- I don't know 5 that it was that summer. I thought there was 6 one later in maybe it was August, September 7 time frame that the banks rejected as being too 8 low. My recollection of that was that there 9 was -- it was like down to twenty-two million 10 dollars. It had dropped by like thirty million 11 dollars from May to -- 12 Q. So -- 13 A. -- whenever that subsequent 14 proposal was or indication of interest. 15 Q. So your claim with respect to 16 Robert Morris and the Whitney proposal doesn't 17 pertain to that second lower proposal but only 18 to the first one? 19 A. I think that's -- yeah, I think 20 that's accurate. 21 Q. What is -- what's your definition 22 of enterprise value, Mr. Miller? Can you tell 23 me what you mean by that? 24 A. Well, again, I'm not a valuation 25 expert. I think it's -- those were</p>
<p style="text-align: right;">Page 343</p> <p>1 of the board as a part of that event, and he 2 and the Morgans then did not move forward with 3 the Whitney transaction, right? They wanted to 4 then try to do some other sort of restructuring 5 and that precipitated, you know, the bank 6 pursuing all the funds in the debtor's 7 account -- basically offsetting against the 8 funds in the debtor's account and there was an 9 acceleration and default notice sent not too 10 long after that. 11 Q. Was the Whitney proposal still on 12 the table in June of 2008 when the new board 13 was in place? 14 A. I'd have to go back and look, but 15 I thought that it -- my understanding was that 16 they were -- you know, it was a 363 process and 17 they were expecting to do that; and when the 18 board switched out and decided we're not going 19 a 363 route, then the Whitney proposal isn't a 20 viable proposal anymore because they're not 21 going to go into bankruptcy. 22 Q. You know -- you're aware of who 23 appointed Robert Morris to the board? 24 A. I understand that the ESOP trustee 25 brought him in.</p>	<p style="text-align: right;">Page 345</p> <p>1 references -- I think that's a reference to 2 kind of the valuations that were coming out of 3 the Houlihan process and are those that are 4 defined by a multiple of EBITDA. That somebody 5 is looking at it saying, you know, here's what 6 the enterprise should have a value of if you 7 approach value from a multiple of EBITDA. 8 Q. And in -- as of May 2008, the 9 company had an enterprise value of at least 10 fifty-four million dollars; is that right? 11 A. Well, I suppose at that juncture 12 when, you know, what you've got is, you know, 13 third-party bids for the company, those two 14 things, you know, would be similar. But, 15 again, I would defer to an expert on those 16 issues. 17 Q. Okay. I thought we looked at some 18 things yesterday where you've indicated in 19 interrogatory responses, I believe -- 20 A. Yes. 21 Q. -- that the company had a value of 22 at least fifty-four million by -- as of May 23 2008; is that right? 24 A. As reflected in that bid from -- 25 or the letter of intent from J.H. Whitney, yes.</p>

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<p>1 Q. So at least J.H. Whitney believed 2 that it had a value of at least fifty-four 3 million at that time? 4 A. Correct. 5 Q. This may be an expert question. 6 If it is, I'm sure you'll tell me. But do you 7 have evidence that indicates that the J.H. 8 Whitney offer that resulted in the board being 9 changed, do you have evidence to indicate that 10 that offer was in the best interest of the ESOP 11 note holders? 12 A. Yes, to the extent that the 13 company is declining in value and this is the 14 value that's out there, and what you're talking 15 about is starting an auction from the point 16 that covers the bank's debt and maybe some 17 additional debt beyond that and you've got two 18 other parties interested in the auction, I 19 mean, that at that juncture, given all that had 20 occurred in the last over a year since the 21 company decided to sell -- the board decided to 22 sell the company, it's at that juncture was the 23 best hope of value for anybody beyond the 24 banks. 25 Q. You're aware that the ESOP was</p>	<p>1 happens, and so for that reason, you know, a 2 shareholder is typically not inclined to go the 3 bankruptcy route because if there's any 4 possibility to somehow generate more dollars, 5 they'll want to do that. But that isn't 6 necessarily in the best interest of the 7 company; and so, you know, that's a position 8 where the board needs to act -- 9 Q. Okay. 10 A. -- and this board didn't. 11 MR. KLINGLER: I believe that's all 12 I've got. Thank you. 13 MS. ANDREW: All right. Lunch break. 14 Forty-five minutes, did that work for everyone 15 yesterday? 16 THE VIDEOGRAPHER: We're off the 17 record. 18 (Pause in proceedings.) 19 THE VIDEOGRAPHER: We're on the 20 record. 21 CROSS-EXAMINATION 22 BY MR. GENTRY: 23 Q. Good afternoon, Mr. Miller. 24 A. Good afternoon. 25 Q. I introduced myself to you</p>
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<p>1 against that deal because Ken Lenoir concluded 2 that there would be no value for the ESOP, 3 right? You're aware -- 4 A. Yes. 5 Q. -- that that was his reasoning? 6 A. Sure. Sure. Yeah. 7 Q. And you're suggesting that he 8 might have -- he may have been wrong because it 9 could have actually resulted in some positive 10 value for the ESOP? 11 MS. ANDREW: Objection. I think your 12 question is confusing two different things. 13 BY MR. KLINGLER: 14 Q. Okay. Did you not understand my 15 question? Maybe it wasn't clear. 16 A. Why don't you repeat it if you 17 would? 18 Q. Are you suggesting that the ESOP 19 trustee was incorrect in concluding that the 20 Whitney proposal would result in no value for 21 the ESOP? 22 A. I think I've indicated earlier 23 that, you know, a bankruptcy filing is probably 24 unlikely to result in value for the equity, 25 although you never know until the auction</p>	<p>1 yesterday. My name is Dan Gentry -- 2 A. Of course. 3 Q. -- and I'm an attorney with 4 Coolidge Wall representing Alan Luce, Nancy 5 Blair, and Guy Walker. 6 A. Okay. 7 Q. Each of those are defendants in 8 the case that you brought on behalf of the 9 Litigation Trust? 10 A. Okay. 11 (Thereupon, Exhibit 791, defendants 12 Nancy Blair, Wayne Alan Luce, and Frederick 13 Walker's notice of deposition of The Antioch 14 Company Litigation Trust pursuant to Fed. R. Civ. 15 P. 30(b)(6), was marked for purposes of 16 identification.) 17 BY MR. GENTRY: 18 Q. I'm going to start by handing you 19 a copy of our deposition notice which has been 20 marked as Exhibit 791 -- 21 A. Okay. 22 Q. -- and ask you whether you have 23 seen that before? 24 A. Yes, I have. 25 Q. And did you review that deposition</p>

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<p>1 notice, Exhibit 791, in advance of today's</p> <p>2 deposition?</p> <p>3 A. I did.</p> <p>4 Q. Have you had time to locate</p> <p>5 documents, information pertaining to the</p> <p>6 subjects addressed in our notice?</p> <p>7 A. Yes, we have.</p> <p>8 Q. Are you the person the Litigation</p> <p>9 Trust has charged with answering the questions</p> <p>10 on the Trust's behalf for the topics listed in</p> <p>11 Exhibit 791?</p> <p>12 A. Yes, I am.</p> <p>13 Q. Thank you. In terms of</p> <p>14 preparation for today's deposition, did you</p> <p>15 review the transcripts for our clients Alan</p> <p>16 Luce, Nancy Blair, and Guy Walker?</p> <p>17 A. Yes, I reviewed portions of each</p> <p>18 of those transcripts.</p> <p>19 Q. And I take it from your prior</p> <p>20 answers that you reviewed all of the exhibits</p> <p>21 that were addressed in the depositions of</p> <p>22 Nancy, Alan, and Guy?</p> <p>23 A. Yes.</p> <p>24 Q. And have you reviewed anything</p> <p>25 after concluding testimony yesterday or this</p>	<p>1 Q. Oh, yeah. I'm not going to start</p> <p>2 with that but you might as well have it.</p> <p>3 A. Yeah, why don't we get that out.</p> <p>4 And there may be -- as we go, I guess,</p> <p>5 depending on what you ask, there's a binder</p> <p>6 probably on LEVIMO that we probably ought to</p> <p>7 have as well. Let's see. Okay.</p> <p>8 Q. If you're looking at the</p> <p>9 confirmation order, I have that --</p> <p>10 A. Yeah.</p> <p>11 Q. -- marked as an exhibit so I can</p> <p>12 give you the pages that I'll be asking you</p> <p>13 about, that will be a little easier.</p> <p>14 A. Okay. That's fine.</p> <p>15 Q. Why don't we -- just to start off</p> <p>16 with and so, you know, in a major effort not to</p> <p>17 re-cover the same ground that we discussed</p> <p>18 before --</p> <p>19 A. Sure.</p> <p>20 Q. -- in looking at our deposition</p> <p>21 notice, topics three and four pertain to the</p> <p>22 LEVIMO transaction?</p> <p>23 A. Yes.</p> <p>24 Q. And then topic five refers</p> <p>25 generally to the subject of facts concealed,</p>
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<p>1 morning to help refresh your memory with</p> <p>2 respect to the topics that we've identified for</p> <p>3 you in our notice?</p> <p>4 A. I took a look back at the Nancy</p> <p>5 Blair deposition. I think that's -- in terms</p> <p>6 of your notice. Yeah, I think that's it.</p> <p>7 Q. I believe there's a binder of</p> <p>8 documents in front of you, and can -- are you</p> <p>9 going to refer to those from --</p> <p>10 MS. ANDREW: That's from this</p> <p>11 morning, I think.</p> <p>12 THE WITNESS: No, that's from this</p> <p>13 morning. I'm sorry.</p> <p>14 BY MR. GENTRY:</p> <p>15 Q. Is there a binder of documents</p> <p>16 that you need in front of you to help you with</p> <p>17 your testimony this afternoon?</p> <p>18 A. I believe that there's a binder</p> <p>19 that goes to your item number two that I've not</p> <p>20 seen, which is the Trust --</p> <p>21 MS. ANDREW: The informal discovery,</p> <p>22 is that it?</p> <p>23 THE WITNESS: Yeah, the informal</p> <p>24 discovery.</p> <p>25 BY MR. GENTRY:</p>	<p>1 and I'll be specific as to that, facts</p> <p>2 concealed in connection with the 2003 ESOP</p> <p>3 transaction. And as to all three of those</p> <p>4 subjects, you've already testified yesterday</p> <p>5 and today?</p> <p>6 A. Yeah, I was a little fuzzy on what</p> <p>7 you were looking for in five since it wasn't --</p> <p>8 didn't seem to be temporally limited or, you</p> <p>9 know, subject matter; but if you're telling me</p> <p>10 2003 ESOP transaction, that's helpful.</p> <p>11 Q. Well, for the purposes of these</p> <p>12 questions, let's limit it that way.</p> <p>13 A. Okay.</p> <p>14 Q. But you've testified on those</p> <p>15 subjects yesterday and today?</p> <p>16 A. Correct.</p> <p>17 Q. And rather than ask you some of</p> <p>18 the same questions and answers, I want to ask</p> <p>19 you generally whether you're aware of facts</p> <p>20 pertaining to those subjects that you have not</p> <p>21 identified or testified to already? And go</p> <p>22 ahead and look at the notice. If there are</p> <p>23 facts that you feel you need to add, feel free</p> <p>24 to do so.</p> <p>25 A. Well, I mean, sure, of course</p>

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<p>1 there are facts that are -- you know, would be 2 in addition. 3 There's seven hundred and 4 eighty-seven deposition exhibits and there's a 5 lot of facts in all those. We did not discuss 6 all of those deposition exhibits yesterday. 7 There were over a million pages of documents 8 that I believe that we've produced in this 9 case. 10 So -- you know, I answered the 11 questions yesterday to the best of my knowledge 12 and best of my recollection having reviewed 13 what I've reviewed and, you know, I would have 14 to review the transcript of yesterday to 15 determine what facts were there and what 16 weren't there and then go through the various 17 deposition exhibits to supplement those facts. 18 Q. Okay. That's fair. You're here 19 pursuant to a 30(b)(6) -- 30(b)(6) deposition 20 notice. 21 A. Uh-huh. 22 Q. And I've identified -- we'll just 23 go topic by topic. 24 Topic number three, we've asked 25 for you to be prepared to identify and discuss</p>	<p>1 respect to adequacy of consideration, if that's 2 what your question is going to. We were 3 raising the issue as to the prudence of the 4 board of having entered into that transaction 5 at that point in time knowing what the board 6 should have known with respect to Mr. Morgan 7 and what was going on with the company. 8 Q. I appreciate that. And just so 9 we're clear for the record, you're not raising 10 any issues regarding the adequacy of 11 consideration exchanged in connection with the 12 LEVIMO transaction that's described in your 13 complaint? 14 A. In terms of what the company gave 15 versus what it gave up, I think the issue 16 goes -- in our view, goes to more of who it was 17 giving it up to and what amount of leverage 18 that allowed that individual to have over the 19 company on the go-forward on a 20 dollars-for-dollars basis. I don't think that 21 we are suggesting the real estate was worth 22 more than the twenty-six million that was paid. 23 Q. Going to topic number four, we've 24 asked you to be prepared to testify regarding 25 each and every term in the LEVIMO lease</p>
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<p>1 and testify regarding any and all facts 2 pertaining to the fair consideration at the 3 time of the LEVIMO transaction described in 4 counts four and five of the first amended 5 complaint for the real estate involved in such 6 transaction. Do you see that? 7 A. Yes. Uh-huh. 8 Q. And do you have any facts 9 pertaining to the fair consideration that you 10 have not testified about up to this point? And 11 if you need to review seven hundred and eighty 12 deposition exhibits, that's certainly your 13 prerogative, although we'll do it off the 14 records. 15 A. With respect to the fair 16 consideration, I think that I testified that 17 there were appraisals done in the spring of 18 2006 and the transaction took place in 19 spring -- or, I'm sorry. The appraisals were 20 done in the fall of 2006, and there are 21 appraisals -- or the transaction was done in 22 the spring of 2007 at or -- at approximately 23 that appraised price. 24 And I think I also testified that 25 there was -- we weren't raising an issue with</p>	<p>1 agreement to which the Trust objects. How such 2 terms harm The Antioch Company and the Trust's 3 efforts to identify commercially unreasonable 4 terms, if any, within such agreement, and all 5 facts relating to The Antioch Company's 6 decision to assume the LEVIMO lease agreement 7 in the bankruptcy proceedings. Do you see 8 that? 9 A. Yes, I do. 10 Q. And I know you testified regarding 11 the issue of leverage in favor of the landlord. 12 A. Uh-huh. 13 Q. So you don't need to repeat any of 14 your testimony as far as I'm concerned. What 15 I'm looking for are facts -- 16 A. Uh-huh. 17 Q. -- that relate to these claims 18 that you haven't identified for us on the 19 record already. 20 A. Okay. 21 Q. So have you knowledge of facts 22 about commercially unreasonable terms within 23 the LEVIMO lease agreement? 24 MS. ANDREW: Do you have that for an 25 exhibit, Dan?</p>



<p style="text-align: right;">Page 358</p> <p>1 MR. GENTRY: The lease agreement?</p> <p>2 MS. ANDREW: Yes.</p> <p>3 MR. GENTRY: It's an exhibit, but I</p> <p>4 don't intend to hand it to him unless he wants to</p> <p>5 look at it. I'm sure you have it.</p> <p>6 THE WITNESS: Do we have a signed</p> <p>7 copy?</p> <p>8 MS. ANDREW: There is a deposition</p> <p>9 exhibit that's a signed copy.</p> <p>10 THE WITNESS: Okay.</p> <p>11 MS. ANDREW: And if you are going to</p> <p>12 discuss what terms are objectionable, unless you</p> <p>13 have that memorized, I think we should have the</p> <p>14 document.</p> <p>15 THE WITNESS: No. We need to look at</p> <p>16 the lease.</p> <p>17 MR. GENTRY: All right. Let's go off</p> <p>18 the record.</p> <p>19 THE WITNESS: Why are we going off</p> <p>20 the record?</p> <p>21 THE VIDEOGRAPHER: We're off the</p> <p>22 record.</p> <p>23 (Pause in proceedings.)</p> <p>24 THE VIDEOGRAPHER: We're on the</p> <p>25 record.</p>	<p style="text-align: right;">Page 360</p> <p>1 April 9, 2007.</p> <p>2 That's a fairly long resolution --</p> <p>3 authorizing resolution, but I don't see in here</p> <p>4 that it specifically indicates that the company</p> <p>5 is agreeing to waive any breach of fiduciary</p> <p>6 duty claims that might arise in the future.</p> <p>7 Q. And you're referring to Exhibit</p> <p>8 498?</p> <p>9 A. Correct, 498.</p> <p>10 Q. And I'm asking you more</p> <p>11 specifically as to Exhibit 79, the lease</p> <p>12 agreement --</p> <p>13 A. Yes.</p> <p>14 Q. -- the terms within the lease</p> <p>15 agreement to which you object, and you</p> <p>16 identified page twelve, I think you said</p> <p>17 Section 3(g)?</p> <p>18 A. Correct.</p> <p>19 Q. All right. Are there other terms</p> <p>20 within the lease agreement to which the Trust</p> <p>21 objects?</p> <p>22 A. Yeah, the other term that we</p> <p>23 object to -- I believe this is a change from</p> <p>24 the prior version of the lease, and I was</p> <p>25 looking back at that from the W.P. Carey</p>
<p style="text-align: right;">Page 359</p> <p>1 BY MR. GENTRY:</p> <p>2 Q. Back on the record. Mr. Miller</p> <p>3 has had the opportunity to review in connection</p> <p>4 with topic four identified in Exhibit 79I</p> <p>5 Exhibit 79 which I believe is the LEVIMO lease</p> <p>6 agreement?</p> <p>7 A. That is correct.</p> <p>8 Q. And you've had a chance to take a</p> <p>9 look at the LEVIMO lease agreement and identify</p> <p>10 for us the terms to which the Trust objects</p> <p>11 within the lease agreement?</p> <p>12 A. Correct. There's a provision on</p> <p>13 page twelve, Section 3(g), that deals with what</p> <p>14 appears to be a prospective waiver by the</p> <p>15 tenant of any breach of fiduciary duty claim by</p> <p>16 entry of the landlord and the tenant into this</p> <p>17 lease or the exercise of any rights granted</p> <p>18 thereunder. So the company purports to have</p> <p>19 waived that in advance.</p> <p>20 It's not clear to me, thinking</p> <p>21 back to the board minutes approving this, that</p> <p>22 that appears to be a term that was vetted at</p> <p>23 that board meeting as reflected in the minutes.</p> <p>24 The following authorized corporation -- that</p> <p>25 exhibit is Exhibit 498 is the board minutes of</p>	<p style="text-align: right;">Page 361</p> <p>1 version in the events of default. This is on</p> <p>2 page thirty-six of the lease. It's Section</p> <p>3 22(a)(14), tenant shall enter into an asset</p> <p>4 transfer in violation of Paragraph 21(j) or a</p> <p>5 change of control in violation of Paragraph</p> <p>6 21(k) shall have occurred, and I believe the</p> <p>7 default in the Carey lease -- and let's see</p> <p>8 that --</p> <p>9 Q. Well, I want to focus on Exhibit</p> <p>10 79 for present purposes. I'm not asking you to</p> <p>11 compare them. And I understand you're</p> <p>12 identifying on page thirty-six Section</p> <p>13 22(a)(14)?</p> <p>14 A. No, Section -- yes, Section</p> <p>15 22(a)(14).</p> <p>16 Q. Are there --</p> <p>17 A. It references Paragraph 21(k) of</p> <p>18 the lease. And Paragraph 21(k) provides --</p> <p>19 let's see. As I read it, that any change of</p> <p>20 control basically gives the landlord, you know,</p> <p>21 another veto power over change of control.</p> <p>22 Now, if it's a credit -- what's</p> <p>23 defined as a credit entity, and I believe</p> <p>24 that's by reference to a certain rate -- you</p> <p>25 know, credit rating, if it's by reference to a</p>

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<p>1 credit entity, the landlord is limited to</p> <p>2 basically being entitled to a guaranty, you</p> <p>3 know. Should be approved -- let's see.</p> <p>4 Q. Well, let me make sure I have a</p> <p>5 clean record. We've identified page twelve,</p> <p>6 Section 3(g).</p> <p>7 A. Uh-huh.</p> <p>8 Q. Page thirty-six, Section</p> <p>9 22(a)(14). And now page thirty-four, Section</p> <p>10 21(k)?</p> <p>11 A. Correct, and those latter two were</p> <p>12 in connection with one another.</p> <p>13 Q. Are there other provisions within</p> <p>14 the lease to which the Trust objects?</p> <p>15 A. I think the other thing we were</p> <p>16 concerned about was the term. I believe it's</p> <p>17 an initial fifteen year term.</p> <p>18 Q. You mean the duration of the lease</p> <p>19 itself?</p> <p>20 A. Yes, the duration of the lease.</p> <p>21 Q. All right. Anything else?</p> <p>22 A. I'm missing this. Yeah, I think</p> <p>23 that -- those are the things that we found most</p> <p>24 concerning under these circumstances with</p> <p>25 LEVIMO, an entity controlled by Lee Morgan as</p>	<p>1 A. Okay.</p> <p>2 Q. -- without us going through it.</p> <p>3 A. Sure.</p> <p>4 Q. What's the significance of the</p> <p>5 fact that the reorganized debtor assumed the</p> <p>6 lease, if any, relative to your claims that the</p> <p>7 lease contains terms to which you object?</p> <p>8 A. I don't see the relative</p> <p>9 significance of those two things.</p> <p>10 Q. So no significance?</p> <p>11 A. The fact that the reorganized</p> <p>12 debtor, which was controlled by the banks,</p> <p>13 wanted to continue to operate --</p> <p>14 Q. It's a yes or no question. Is it</p> <p>15 significant or not significant? And I think</p> <p>16 you said no. I'm just looking to make sure I</p> <p>17 understand your answer.</p> <p>18 A. Yeah, I don't understand why --</p> <p>19 no, I don't see the significance of it.</p> <p>20 Q. Thank you. Now, two of our</p> <p>21 clients, Nancy Blair and Alan Luce, are</p> <p>22 defendants on the breach of fiduciary duty and</p> <p>23 aiding and abetting claims connected with the</p> <p>24 LEVIMO transaction, right? Are you aware of</p> <p>25 that?</p>
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<p>1 the landlord.</p> <p>2 Q. As to each of the terms that</p> <p>3 you've identified, is it the Trust's position</p> <p>4 that they were commercially unreasonable at the</p> <p>5 time that the lease was executed?</p> <p>6 A. What do you mean by commercially</p> <p>7 unreasonable?</p> <p>8 Q. Commercially unreasonable,</p> <p>9 contrary to the custom for similar leases in</p> <p>10 the industry and the location, St. Cloud,</p> <p>11 Minnesota, a commercial lease for like, kind</p> <p>12 buildings based on the price. Do you have any</p> <p>13 facts that suggest to you that those terms are</p> <p>14 commercially unreasonable?</p> <p>15 A. No, not as I sit here today.</p> <p>16 Q. You're aware that the reorganized</p> <p>17 debtor assumed the LEVIMO lease in the</p> <p>18 bankruptcy proceedings, true?</p> <p>19 A. I presume that would be a</p> <p>20 provision in the plan, but I -- it was my</p> <p>21 understanding that it did. I don't -- yeah, I</p> <p>22 believe it did.</p> <p>23 Q. Okay. Well, let's, for the sake</p> <p>24 of discussion, assume that it's true and it's</p> <p>25 in the plan someplace --</p>	<p>1 A. They were board members, yes.</p> <p>2 Uh-huh. Yes. Uh-huh.</p> <p>3 Q. There are no facts that you're</p> <p>4 aware of suggesting that Nancy Blair or Alan</p> <p>5 Luce had any personal stake in the LEVIMO</p> <p>6 transaction, true?</p> <p>7 A. I'm not aware of any. What do you</p> <p>8 mean by personal stake? Let me take it back.</p> <p>9 What do you mean by personal stake?</p> <p>10 Q. Well, you've alluded, I think,</p> <p>11 more than once to the fact that LEVIMO is a Lee</p> <p>12 Morgan entity, right?</p> <p>13 A. Correct.</p> <p>14 Q. He's the owner?</p> <p>15 A. Correct.</p> <p>16 Q. All right. And part of your</p> <p>17 problem with the transaction is that he stood</p> <p>18 on more than one side of the transaction,</p> <p>19 essentially, because he's going to be the</p> <p>20 landlord and continue to be the CEO?</p> <p>21 A. Correct.</p> <p>22 Q. You don't have any facts to</p> <p>23 suggest to you that Alan Luce or Nancy Blair</p> <p>24 had any interest in the LEVIMO entity, true?</p> <p>25 A. I'm not aware of them having any</p>

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<p>1 interest in LEVIMO.</p> <p>2 Q. And you're not aware of them</p> <p>3 having any personal interest or stake in the</p> <p>4 LEVIMO transaction personally?</p> <p>5 A. Again, what do you mean by</p> <p>6 personal stake?</p> <p>7 Q. Did they -- did Alan Luce or Nancy</p> <p>8 Blair, to the best of your knowledge and based</p> <p>9 upon the documents that you've reviewed and the</p> <p>10 research that the Trust has undertaken, benefit</p> <p>11 in any way from the fact that the LEVIMO</p> <p>12 transaction went forward?</p> <p>13 A. Well, Nancy Blair had a close</p> <p>14 personal relationship with Asha Morgan Moran,</p> <p>15 Lee Morgan's daughter.</p> <p>16 Q. I'm asking in the sense of dollars</p> <p>17 and cents.</p> <p>18 A. I'm not aware of any dollars and</p> <p>19 cents.</p> <p>20 Q. Let's move on to another topic.</p> <p>21 And just real -- you've testified -- in topic</p> <p>22 five I asked you about facts that were</p> <p>23 concealed in connection with the 2003 ESOP</p> <p>24 transaction from the Trust's point of view.</p> <p>25 A. Yes.</p>	<p>1 A. Well -- yeah, I think I went into</p> <p>2 some amount of detail on that and what the</p> <p>3 issues were with the proxy materials. And do</p> <p>4 you -- is that separate and apart from the</p> <p>5 board or -- you know, the universe of the proxy</p> <p>6 people were all of the selling shareholders,</p> <p>7 the selling -- I'm sorry, selling nonESOP</p> <p>8 shareholders and ultimately the ESOP</p> <p>9 participants received that, as I understand it.</p> <p>10 Q. Let's start with -- whoever</p> <p>11 received the proxy materials and within the</p> <p>12 proxy materials you've testified at length.</p> <p>13 A. Yes.</p> <p>14 Q. Are there any other facts that you</p> <p>15 haven't got a chance to tell us about?</p> <p>16 A. With respect to the proxy</p> <p>17 materials --</p> <p>18 Q. Right.</p> <p>19 A. -- or something else?</p> <p>20 Q. The proxy materials.</p> <p>21 A. We did not use and go over the</p> <p>22 cover letters that went to the participants.</p> <p>23 You'll recall that we were using the two</p> <p>24 different exhibits, and my focus was on the</p> <p>25 proxy -- you know, the actual proxy statement</p>
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<p>1 Q. Do you see that?</p> <p>2 A. Yeah, let me pull it up here.</p> <p>3 Just a second. Do I need this still?</p> <p>4 Q. The LEVIMO? No, we're done with</p> <p>5 that for now.</p> <p>6 A. Can I hand that away then? Thank</p> <p>7 you.</p> <p>8 Q. If you want to look at that topic.</p> <p>9 My question really is very simple because</p> <p>10 you've been asked a lot of questions and you've</p> <p>11 gone through Exhibit 31 or Exhibit 560 at</p> <p>12 length --</p> <p>13 A. Uh-huh.</p> <p>14 Q. -- and I don't intend to recover</p> <p>15 that ground.</p> <p>16 A. Okay.</p> <p>17 Q. I'm asking you whether you have</p> <p>18 knowledge of any facts relating to the issue of</p> <p>19 concealment in connection with the 2003 ESOP</p> <p>20 transaction that you haven't testified about</p> <p>21 already in the last day and a half?</p> <p>22 A. Concealment from whom?</p> <p>23 Q. Concealment from anyone who</p> <p>24 received the proxy materials. Because we spent</p> <p>25 the most time on those.</p>	<p>1 document itself.</p> <p>2 In terms of the cover letter and</p> <p>3 communication thing, it's my recollection that</p> <p>4 there are similar issues with that as those</p> <p>5 that I identified in the proxy statement with</p> <p>6 respect to Houlihan Lokey's role and to the</p> <p>7 extent of its opinion and that sort of stuff.</p> <p>8 So it's in the same vein but in a different</p> <p>9 part of the document that we did not discuss.</p> <p>10 Q. Fair enough. And I recall that</p> <p>11 there were -- there were some language or</p> <p>12 description of Houlihan Lokey in different</p> <p>13 places in the document --</p> <p>14 A. Correct.</p> <p>15 Q. -- that was very similar?</p> <p>16 A. Correct.</p> <p>17 Q. And you objected to it in each</p> <p>18 instance where it appeared?</p> <p>19 A. That was the intention, yes, of</p> <p>20 what I tried to convey yesterday. We just --</p> <p>21 we didn't have an exhibit that had that</p> <p>22 additional -- those additional pages to it. I</p> <p>23 was working off of a different exhibit, and my</p> <p>24 recollection of those additional pages is that</p> <p>25 there were similar issues in those pages as</p>

<p style="text-align: right;">Page 370</p> <p>1 there were in what was in the proxy statement  2 as it pertains to Houlihan Lokey's opinion and  3 role in the transaction.  4 Q. Now, based upon your question to  5 me about the universe outside the proxy  6 materials, are you aware of facts that were  7 misrepresented or concealed from, let's say,  8 the service providers who worked in connection  9 with the 2003 ESOP transaction?  10 A. Well, I think I've expressed  11 concern previously about the company's  12 projections in light of what the monthly  13 financial statements -- at least the financial  14 narrative, I should say, the monthly financial  15 narrative that Mr. Morgan generated in the  16 late -- I guess it would be -- I think they're  17 2002 and then into 2003 and '04 with respect to  18 productivity of the consultants, keeping in  19 mind that the revenue driver here is the  20 consultants and it's the metrics on the  21 consultants that are significant and --  22 Q. Let me break down --  23 A. Sure.  24 Q. -- just for a minute --  25 A. Sure.</p>	<p style="text-align: right;">Page 372</p> <p>1 in the January, February 2001 time frame where  2 they are explaining to Asha what the issues are  3 with the company and company management.  4 And one of the issues in those  5 board members are board members who were on the  6 board at the time of this ESOP transaction who  7 voted in favor of it and who profited from it.  8 And that was Mr. Carlson and Mr. -- is it  9 Sanan? I believe that they each sent e-mails  10 at about that same time period with respect to  11 issues with management and the company.  12 And one of the issues that they  13 raised, which is the company was unable to  14 forecast at all or basically had -- I forget  15 the precise language. But an issue was raised  16 by one, and possibly both of them, with respect  17 to the company's ability to forecast.  18 And then if you fast-forward to  19 the 2005, 2006 time frame where Richard Wiser  20 is brought in, and the company has the same  21 problem.  22 Q. Right. But I'm asking you  23 specifically about misrepresentations and  24 concealment to service providers in connection  25 with the 2003 ESOP transaction.</p>
<p style="text-align: right;">Page 371</p> <p>1 Q. -- if I may. As it pertains to  2 the 2003 ESOP transaction --  3 A. Uh-huh.  4 Q. -- people within The Antioch  5 Company provided projections and estimates  6 regarding a host of financial issues and  7 performance going forward into the future,  8 right?  9 A. That's my understanding, yeah.  10 Q. And those projections were  11 provided to various constituencies?  12 A. Correct.  13 Q. Deloitte, right, was one of them?  14 A. That's my understanding, yeah, and  15 the documents tend to indicate that. Yes.  16 Q. All right. And you're telling us  17 that in terms -- and I'm asking specifically as  18 to the issue of misrepresentation --  19 A. Uh-huh.  20 Q. -- or concealment, and you're  21 saying that you believe that there was  22 misrepresentation or concealment within those  23 projections and that's a concern to you?  24 A. No. What I'm concerned about is  25 there are e-mails from two of the board members</p>	<p style="text-align: right;">Page 373</p> <p>1 A. Uh-huh. And I'm telling you that  2 you have two board members --  3 Q. So 2005 doesn't come into play in  4 that, right?  5 A. Well --  6 Q. It couldn't because 2005 hadn't  7 happened yet. So let's focus on the time frame  8 that I'm asking you about.  9 Let me ask you first about this  10 e-mail from Carlson and Sanan. Is that an  11 exhibit in the case at this point, to your  12 knowledge?  13 A. Yes, it is.  14 Q. And do you know which exhibit it  15 is?  16 A. Not off the top of my head, no.  17 Q. So you're addressing the issue of  18 forecasting and problems the company had  19 forecasting and prior to 2003, generally  20 speaking, the problem with forecasting was  21 their forecasts were always too low, right?  22 A. I don't believe that it was in  23 terms of low. I think it was they cannot  24 forecast the business on the go-forward, and  25 that that condition appears to have continued</p>

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1 up until 2007 and possibly beyond.

2 Q. And just so we're clear on my  
3 question, which is asking about  
4 misrepresentation or concealment --

5 A. Uh-huh.

6 Q. -- to service providers --

7 A. Uh-huh.

8 Q. -- you're identifying the  
9 company's inability to forecast. And is that  
10 the same thing as misrepresentation in your  
11 mind?

12 A. No. The concern is --

13 Q. Is that the same thing as  
14 concealment, in your mind?

15 A. Again, I'm not seeing  
16 documentation indicating that those service  
17 providers were made aware of that issue.

18 Q. The forecasting issue, that's  
19 fine. I'm asking you --

20 A. The forecasting issues. And  
21 also --

22 Q. Hold on. Let me ask you the  
23 question and you can answer the question.

24 A. You're not letting me finish the  
25 answer that I'm giving.

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1 Q. You're going in a different  
2 direction and we just don't have time for that  
3 anymore.

4 I asked you about  
5 misrepresentation, and your answer was the  
6 inability to forecast is not the same as  
7 misrepresentation. My next question is, as to  
8 concealment, is the company's inability to  
9 forecast equivalent to concealment, in your  
10 mind, as it relates to the 2003 ESOP  
11 transaction and the information provided to  
12 service providers? Yes or no, please?

13 THE WITNESS: Can you read the  
14 question back for me, please?

15 MR. GENTRY: That's fair.

16 (Record read.)

17 THE WITNESS: I don't understand your  
18 question, I guess. Is concealment the same thing  
19 as -- is an inability to forecast the same thing  
20 as concealment? I thought you were asking is --  
21 you're wanting to know what things are concealed.  
22 I'm trying to tell you that it appears to me that  
23 there's knowledge on the part of a couple board  
24 members that the company can't forecast its  
25 numbers. They're doing a transaction, the

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1 valuations for which are based almost entirely  
2 upon the forecasting numbers. They're not hitting  
3 the forecast that year, that piece I think those  
4 folks know. I don't know that that was concealed.

5 But it's not clear to me that the  
6 fact that the board members had concerns about the  
7 ability -- the company's ability to forecast, I  
8 don't see any indication that that was shared with  
9 anyone or other board members.

10 BY MR. GENTRY:

11 Q. Do you see an indication at the  
12 time that the 2003 transaction was being  
13 undertaken -- and I'll make it more specific.

14 As to the time that service  
15 providers received forecasts, do you see an  
16 indication anywhere in the record that the  
17 concern you identified from Sanan and Carlson  
18 still existed in 2003? I want to hear about  
19 2003, not 2005, not 2002.

20 I'll reformulate it for you.

21 A. Other than the fact -- other than  
22 the fact that the company is not meeting its  
23 forecasted sales, no; but I don't concede that  
24 the fact that they weren't able to forecast in  
25 2001 and weren't able to forecast as late as

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1 2007, I don't concede that those two things are  
2 not relevant to what was going on in 2003.

3 Q. Let's move on to the next topic.  
4 And we've asked you in topic number six to be  
5 prepared to testify regarding each and every  
6 fact that the Trust relies upon to support its  
7 claim that the defendant Frederick Guy Walker  
8 had authority to direct, influence, or control  
9 the restructuring/sale process described in  
10 count six and seven of the first amended  
11 complaint. Do you see that?

12 A. Yes.

13 Q. And are you prepared to testify  
14 regarding such facts?

15 A. Yes.

16 Q. Please do.

17 A. I may have touched on this  
18 yesterday; but as I understand it, Mr. Walker  
19 was brought in as a consultant and then came in  
20 as president of Creative Memories North America  
21 in the December of 2007 time frame, and that in  
22 that capacity he was working with Asha Moran  
23 and he was out doing and involved in the sale  
24 process in doing the presentations to potential  
25 purchasers and interested parties.

38 (Pages 374 to 377)



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1 There is also e-mail traffic with  
2 respect to him being at least copied and in the  
3 loop on, you know, the subsequent letters that  
4 went later that year with respect to the  
5 Condor -- I'm sorry, with respect to the ESOP  
6 notes and the fact that those notes would not  
7 be paid.

8 I think the Trust's view of that  
9 is he's an officer of the company. It's the  
10 largest revenue driving company -- part of the  
11 company. In that capacity, you know, he  
12 should -- if he didn't know, he should know  
13 what the financial situation of the company --  
14 in that portion of the company was.

15 And if he was involved in the sale  
16 process in which Houlihan and others were  
17 involved in, he should have known the  
18 importance of getting a sale done and, you  
19 know, should have worked to facilitate that.  
20 And we don't see any indication that he did or  
21 that he was going to the special committee  
22 saying, hey, we've got to sell this thing and  
23 we've got to bring, you know, new dollars in,  
24 you know, to improve the sale situation.

25 Q. Did you review Exhibit 584, the

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1 independent consultant agreement for  
2 Mr. Walker?

3 A. Yes, I did.

4 Q. It's dated December 1st of 2007,  
5 right?

6 A. Yes.

7 Q. And it runs through February 29th  
8 of 2008, right?

9 A. Correct.

10 Q. And among other things, the  
11 independent contractor agreement says that  
12 Mr. Walker and his employees are not authorized  
13 to and shall not represent themselves or hold  
14 themselves out as employees of the company,  
15 meaning Antioch --

16 A. Uh-huh.

17 Q. -- and are not authorized to and  
18 shall not enter into any contracts, agreements,  
19 or other commitments on behalf of the company.  
20 That's on page four of Exhibit 584. Did you  
21 read that?

22 A. Yes.

23 Q. And are you saying to us it's the  
24 Trust's position that despite this language,  
25 Mr. Walker had authority to negotiate on behalf

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1 of the company?

2 A. Lee Morgan represented to other  
3 parties, to the bank, that he was the new  
4 president of CM North America.

5 Q. I think it said interim president  
6 of Creative Memories North America and  
7 identified him as a consultant. So my question  
8 is really more specifically to the actual issue  
9 of whether Guy walker could, and this says he  
10 couldn't, could he enter into any contracts on  
11 behalf of The Antioch Company as an independent  
12 consultant pursuant to this agreement?

13 A. Pursuant to that agreement, no.

14 Q. Do you have any knowledge that he  
15 ever did enter into any contracts or negotiated  
16 on behalf of the company while he was an  
17 independent consultant for the company?

18 A. Not as I sit here today, no.

19 Q. All right. And that agreement was  
20 extended until May 31st of 2008, right?

21 A. I believe so.

22 Q. And if you want to look at Exhibit  
23 585. I can give you that.

24 A. I'll trust you.

25 Q. So during that period of time

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1 Mr. Walker was an independent contractor?

2 A. That's what those contracts say.

3 Q. And he was not -- and you have no  
4 facts to show that he did anything but be an  
5 independent contractor?

6 A. I thought we had more than one  
7 e-mail where he was represented as being  
8 president of Creative Memories North America  
9 post the one that we discussed.

10 Q. Did those e-mails -- did  
11 Mr. Walker ever act with that authority based  
12 upon those e-mails that you're addressing, to  
13 your knowledge?

14 A. Well, not to my knowledge.

15 Q. And did you read in Mr. Walker's  
16 deposition transcript where he addressed the  
17 question of whether he actually negotiated on  
18 behalf of The Antioch Company?

19 A. I believe that he indicated that  
20 he did not.

21 Q. And do you have any facts to  
22 contradict that testimony?

23 A. Again, other than what we've seen  
24 in the e-mails, I don't -- sitting here now, I  
25 don't think we do.

39 (Pages 378 to 381)

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<p>1 Q. And are the e-mails you're</p> <p>2 referring to exhibits to Mr. Walker's</p> <p>3 deposition already?</p> <p>4 A. I believe that they are.</p> <p>5 Q. And to the best of your knowledge,</p> <p>6 did -- Mr. Walker became an officer of The</p> <p>7 Antioch Company only as of June 12th of 2008,</p> <p>8 right?</p> <p>9 A. It was some point in time at or</p> <p>10 toward the end of that -- the second tier of</p> <p>11 the consulting. I don't recall the precise</p> <p>12 date but --</p> <p>13 Q. Well, I'll give you -- you can</p> <p>14 look at Exhibit 586 if you like, if that's</p> <p>15 helpful. It's minutes from a board meeting.</p> <p>16 A. If that's what -- if that's what</p> <p>17 it says, that's what it says.</p> <p>18 Q. That's what it says.</p> <p>19 A. Okay. Very good.</p> <p>20 Q. And you don't have any facts to</p> <p>21 contradict that, I suppose?</p> <p>22 A. I do not.</p> <p>23 Q. Fair enough. And the minutes</p> <p>24 don't reflect that Mr. Walker was in attendance</p> <p>25 at the meeting.</p>	<p>1 true?</p> <p>2 A. Correct; and, in fact, by that</p> <p>3 time the board had been changed.</p> <p>4 Q. Right. In fact, the board of</p> <p>5 directors, including two of our clients, Alan</p> <p>6 Luce and Nancy Blair, was terminated in the</p> <p>7 first week of June of 2008?</p> <p>8 A. Correct.</p> <p>9 Q. And the reason why they were</p> <p>10 terminated is because they were in favor of</p> <p>11 accepting the J.H. Whitney offer, true?</p> <p>12 A. That's my understanding, yes.</p> <p>13 Q. So -- and it's your position that</p> <p>14 Mr. Walker aided and abetted breaches of</p> <p>15 fiduciary duty -- or breached fiduciary duties</p> <p>16 in connection with the sale process, right?</p> <p>17 A. I think our issue was with respect</p> <p>18 to his role which appeared to us to be of a</p> <p>19 presidential nature despite what's in the</p> <p>20 contract. His involvement in the sales</p> <p>21 presentations, and the fact that that process</p> <p>22 is dragging on and he's one more of those</p> <p>23 people that is involved in this process that is</p> <p>24 dragging on when, as I've testified earlier, it</p> <p>25 appears to us that the process needed to move</p>
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<p>1 A. Okay.</p> <p>2 Q. So what facts do you know of to</p> <p>3 suggest that Mr. Walker actually knew he became</p> <p>4 an officer on June 12th of 2008?</p> <p>5 A. You're suggesting that they made</p> <p>6 him an officer and didn't tell him?</p> <p>7 Q. I think Mr. Walker has testified</p> <p>8 to that fact already.</p> <p>9 A. Okay.</p> <p>10 Q. If you read his transcript, you</p> <p>11 might have seen that.</p> <p>12 A. Again, it's -- okay.</p> <p>13 Q. Do you have any facts as you sit</p> <p>14 here today that tend to establish that</p> <p>15 Mr. Walker was an officer prior to June 12th of</p> <p>16 2008?</p> <p>17 A. Aside from how he was represented</p> <p>18 to third parties by others in the company in</p> <p>19 the e-mails that I previously referenced, the</p> <p>20 one of which you say is an interim president</p> <p>21 and a consultant, and -- I thought that there</p> <p>22 was at least one or more others but possibly</p> <p>23 not.</p> <p>24 Q. Now, by June 12th of 2008, the</p> <p>25 sale process had been ongoing for a long time,</p>	<p>1 to a 363 -- you know, a prompt sale process</p> <p>2 much earlier than what it actually did.</p> <p>3 Q. But Mr. Walker wasn't involved in</p> <p>4 that time frame?</p> <p>5 A. Well, he was involved for the --</p> <p>6 you know, certainly it seems -- it appeared to</p> <p>7 us from the January -- at least January -- you</p> <p>8 know, December 2007, January on time frame and,</p> <p>9 you know, all of that is the -- really the -- a</p> <p>10 fair portion of the sale process.</p> <p>11 Q. Let's talk about June 12, 2008</p> <p>12 forward.</p> <p>13 A. Okay.</p> <p>14 Q. What facts are you aware of where</p> <p>15 Mr. Walker utilized his authority as an officer</p> <p>16 of the company to influence the sale process?</p> <p>17 A. I'm not aware that he did, I</p> <p>18 guess, at that -- from June 12th, 2004 -- or</p> <p>19 2008 going forward.</p> <p>20 Again, I think our issue is</p> <p>21 focused on the January through May time frame,</p> <p>22 his role represented as being the president of</p> <p>23 the largest division and the fact that he is --</p> <p>24 we're not finding anywhere where he is saying,</p> <p>25 hey, we need to get this thing sold and going</p>

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<p>1 to the special committee saying we need to get</p> <p>2 this thing sold.</p> <p>3 Q. I want to move on to another topic</p> <p>4 and talk a little bit about some of the claims</p> <p>5 against Nancy Blair.</p> <p>6 A. Sure.</p> <p>7 Q. Now, the Litigation Trust is suing</p> <p>8 Nancy Blair for breaches of fiduciary duty</p> <p>9 connected with the 2003 ESOP transaction, true?</p> <p>10 A. Yes, she is in the count one, I</p> <p>11 believe, is she not?</p> <p>12 Q. Alan Luce is not a defendant -- or</p> <p>13 actually Nancy Blair is a defendant on counts</p> <p>14 one and two, right?</p> <p>15 A. Let me look to confirm, but I</p> <p>16 believe that that is the case. Yes. She's in</p> <p>17 count two. Count one is the -- oh, I'm sorry,</p> <p>18 yes, she's in one and two. I'm sorry.</p> <p>19 Q. And Alan Luce is not listed as a</p> <p>20 defendant in counts one and two, true?</p> <p>21 A. That is correct.</p> <p>22 Q. Now, Alan Luce was a director at</p> <p>23 the time that the 2003 ESOP transaction was</p> <p>24 approved by the Antioch board of directors,</p> <p>25 true?</p>	<p>1 think it's Sandy Borstad and Debra</p> <p>2 Brooks-Cain --</p> <p>3 A. Uh-huh.</p> <p>4 Q. -- is it the Trust's position that</p> <p>5 those three members of the board of directors</p> <p>6 breached any fiduciary duties by failing to</p> <p>7 vote against the 2003 ESOP transaction?</p> <p>8 A. I think the Trust's position is</p> <p>9 that because the board, was it six of nine,</p> <p>10 were conflicted and had a personal financial</p> <p>11 interest in the outcome, that an independent --</p> <p>12 there had to be an independent fairness</p> <p>13 evaluation with respect to the transaction from</p> <p>14 the standpoint of the company.</p> <p>15 Q. I understand that's your</p> <p>16 position --</p> <p>17 A. Uh-huh.</p> <p>18 Q. -- relative to the structure of</p> <p>19 the transaction.</p> <p>20 A. Correct.</p> <p>21 Q. And my question really is as to</p> <p>22 those three individuals -- and I'll take a step</p> <p>23 back if that's helpful.</p> <p>24 A. Uh-huh.</p> <p>25 Q. To your knowledge, Alan Luce did</p>
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<p>1 A. That is correct.</p> <p>2 Q. And there were two employee-owner</p> <p>3 directors on the board of directors at that</p> <p>4 time, too, right?</p> <p>5 A. Yes.</p> <p>6 Q. Now, did the employee-owner</p> <p>7 directors owe fiduciary duties to The Antioch</p> <p>8 Company by virtue of their membership on the</p> <p>9 board of directors?</p> <p>10 A. I would expect so, yes.</p> <p>11 Q. Did they owe the same duties as</p> <p>12 other members of the board of directors?</p> <p>13 A. I would think so, but that may be</p> <p>14 a legal issue that I frankly don't know the</p> <p>15 answer to as I sit here today --</p> <p>16 Q. Fair.</p> <p>17 A. -- but --</p> <p>18 Q. And Alan Luce and those</p> <p>19 employee-owners certainly owed fiduciary duties</p> <p>20 to The Antioch Company at the time of the</p> <p>21 transaction as members of the board of</p> <p>22 directors, true?</p> <p>23 A. Yes, Luce certainly would. Yes.</p> <p>24 Q. Is it the Trust's contention that</p> <p>25 Alan Luce or the employee-owner directors, I</p>	<p>1 not vote against the transaction?</p> <p>2 A. Correct.</p> <p>3 Q. To your knowledge, Debra</p> <p>4 Brooks-Cain did not vote against the</p> <p>5 transaction?</p> <p>6 A. Correct.</p> <p>7 Q. And to your knowledge, Sandy</p> <p>8 Borstad did not vote against the transaction?</p> <p>9 A. Correct.</p> <p>10 Q. Is it the Trust's position that</p> <p>11 the failure of those three people to vote</p> <p>12 against the transaction was a breach of their</p> <p>13 fiduciary duties?</p> <p>14 A. I don't think that -- as indicated</p> <p>15 in our complaint, I don't think the Trust has</p> <p>16 taken a position with respect to that.</p> <p>17 Q. And you haven't sued them for</p> <p>18 that, though, have you?</p> <p>19 A. No.</p> <p>20 Q. Is there any reason why you</p> <p>21 wouldn't sue them for that if you thought that</p> <p>22 they had violated their fiduciary duties by</p> <p>23 voting or failing to vote --</p> <p>24 A. Well.</p> <p>25 Q. -- in connection with the 2003</p>

<p style="text-align: right;">Page 390</p> <p>1 ESOP transaction?</p> <p>2 A. It's my understanding that none of</p> <p>3 them took any dollars out; and with respect to</p> <p>4 the employees, I'm not convinced that their</p> <p>5 duties would necessarily be the same. And as I</p> <p>6 stated earlier, I think the issue was one that</p> <p>7 under Ohio law could only be dealt with through</p> <p>8 an independent fairness opinion for the</p> <p>9 company.</p> <p>10 Q. I understand that. And my</p> <p>11 question was whether if you as the Litigation</p> <p>12 Trustee believed that those three people had</p> <p>13 violated their fiduciary duties in connection</p> <p>14 with the 2003 ESOP transaction, that you would</p> <p>15 have sued them for that breach of fiduciary</p> <p>16 duty? Yes or no or I don't know?</p> <p>17 A. Again, that was not -- it's not</p> <p>18 reflected in the -- that's not what we done</p> <p>19 and, in my view, that's hypothetical.</p> <p>20 Q. Well, the fact that you didn't sue</p> <p>21 them isn't hypothetical, right?</p> <p>22 A. No, that's true.</p> <p>23 Q. That's a fact?</p> <p>24 A. Correct.</p> <p>25 Q. Nancy Blair resigned from the</p>	<p style="text-align: right;">Page 392</p> <p>1 her duties in 2003?</p> <p>2 A. I know that Nancy Blair was a</p> <p>3 member of the board since 2001; and when it</p> <p>4 came time to do this transaction, she hopped</p> <p>5 off the board until about a year after the</p> <p>6 transaction.</p> <p>7 Q. You're not answering my question.</p> <p>8 My question was about the issue of whether</p> <p>9 Nancy Blair, when she became an employee of The</p> <p>10 Antioch Company holding the title of director</p> <p>11 of corporate strategy -- do you have that in</p> <p>12 mind?</p> <p>13 A. Yes.</p> <p>14 Q. -- was that position -- did that</p> <p>15 position make her an officer of The Antioch</p> <p>16 Company, to your knowledge?</p> <p>17 A. To my knowledge as I sit here</p> <p>18 presently, I do not know.</p> <p>19 Q. What fiduciary duties does the</p> <p>20 Trust contend that Nancy Blair owed to Antioch</p> <p>21 as an employee in connection with the 2003 ESOP</p> <p>22 transaction?</p> <p>23 A. I think as an employee who had</p> <p>24 formerly been on the board and while she was on</p> <p>25 the board was involved in the formulation of</p>
<p style="text-align: right;">Page 391</p> <p>1 board of directors on or around August 21st,</p> <p>2 2003 as noted in Exhibit 381. Are you aware of</p> <p>3 that fact?</p> <p>4 A. Yes. Uh-huh.</p> <p>5 Q. And at that point Nancy became a</p> <p>6 director of corporate strategy as an employee</p> <p>7 of The Antioch Company, true?</p> <p>8 A. That's my understanding, yes.</p> <p>9 Q. And that position is not a</p> <p>10 position on the Antioch board of directors?</p> <p>11 A. That's correct.</p> <p>12 Q. And that position is not an</p> <p>13 officer of The Antioch Company either, true?</p> <p>14 A. Okay.</p> <p>15 Q. Do you agree or disagree?</p> <p>16 A. I don't have a list of their</p> <p>17 officers for that year in front of me. Is</p> <p>18 there a -- do you have information that she's</p> <p>19 not an officer?</p> <p>20 Q. I don't have it in front of me but</p> <p>21 I will state it another way. Do you have</p> <p>22 knowledge of any facts that suggest to you that</p> <p>23 the director of corporate strategy was an</p> <p>24 officer of The Antioch Company at the time that</p> <p>25 Nancy Blair assumed that position and performed</p>	<p style="text-align: right;">Page 393</p> <p>1 this what subsequently became the ESOP</p> <p>2 transaction --</p> <p>3 Q. Well, let me ask you a question</p> <p>4 generally.</p> <p>5 A. Yeah.</p> <p>6 Q. To your knowledge, do board</p> <p>7 members continue to owe fiduciary duties to a</p> <p>8 corporation after they resign from the board of</p> <p>9 directors on a go-forward basis?</p> <p>10 A. Well, I guess from my experience</p> <p>11 in the bankruptcy realm, folks that -- whether</p> <p>12 or not -- the title is not as important as the</p> <p>13 level of control over which the individual</p> <p>14 exercises. Whether they are a director or not</p> <p>15 doesn't necessarily define whether they're an</p> <p>16 insider and subject to higher duties. And so</p> <p>17 that's where I think, you know, Miss Blair was</p> <p>18 the lead person on this -- you know, basically</p> <p>19 the lead project manager on this transaction</p> <p>20 and she was a board member up through the time</p> <p>21 that the transaction was planned and hopped off</p> <p>22 as the project moved forward but then was back</p> <p>23 on a year later.</p> <p>24 Q. Do you have any knowledge of facts</p> <p>25 suggesting to you that Nancy Blair had the</p>

<p style="text-align: right;">Page 394</p> <p>1 discretion to stop pursuing the 2003 ESOP 2 transaction?</p> <p>3 A. She clearly had a lot of influence 4 over the process.</p> <p>5 Q. As an employee of The Antioch 6 Company, did she report to someone else, to the 7 best of your knowledge?</p> <p>8 A. I would think that she did, but I 9 don't know precisely who she reported to.</p> <p>10 Q. Now, prior to the 2003 ESOP 11 transaction up until about November of 2003, 12 Nancy Blair held no shares of stock in The 13 Antioch Company, true?</p> <p>14 A. I believe that to be the case, 15 yeah.</p> <p>16 Q. The fact of the matter is that the 17 board of directors and management decided to 18 award her seventy-five shares as a bonus in 19 recognition of her service to the company as an 20 employee, true?</p> <p>21 A. That is my understanding, yes.</p> <p>22 Q. Now, you don't have any knowledge 23 of facts that Nancy knew in advance about this 24 bonus, true?</p> <p>25 A. No, I don't.</p>	<p style="text-align: right;">Page 396</p> <p>1 Q. -- generally?</p> <p>2 A. Yes.</p> <p>3 Q. And when a company is going 4 through a transaction, EBITDA is a common 5 figure used to -- in conjunction with a 6 multiplier to determine value for a 7 transaction, true?</p> <p>8 A. Sure.</p> <p>9 Q. What facts do you know of that 10 suggest to you that Antioch's EBITDA declined 11 because of the sale process between April of 12 2007 and the bankruptcy filing?</p> <p>13 A. The EBITDA declined because of the 14 sale process. Well --</p> <p>15 Q. Maybe I should say it a different 16 way. Did it decline because of the sale 17 process, to your knowledge?</p> <p>18 A. Well, certainly the company was 19 incurring more expenses and the expenses would 20 reduce the EBITDA and the expenses through the 21 process, including Houlihan and, you know, 22 legal fees and, in fact, I believe Mr. Morgan 23 on more than one occasion complains about the 24 cost of the process, so I suppose that's 25 something that would reduce EBITDA.</p>
<p style="text-align: right;">Page 395</p> <p>1 Q. And you have no facts to suggest 2 that Nancy Blair made any decisions in 3 performing her duties as an employee based on 4 the possibility that she might receive a bonus, 5 true?</p> <p>6 A. I don't have any information to 7 that effect as I sit here, no.</p> <p>8 Q. And Nancy Blair was an employee, 9 not a director when the board of directors 10 approved the 2003 ESOP transaction in the fall 11 of 2003, true?</p> <p>12 A. That is true.</p> <p>13 Q. Nancy Blair had no vote as a 14 member of the board of directors at the time 15 that the board of directors approved the 2003 16 ESOP transaction, true?</p> <p>17 A. That's my understanding, yes.</p> <p>18 Q. I'll move on to another topic and 19 ask you some questions about the sales process, 20 if I may.</p> <p>21 A. Of course.</p> <p>22 Q. What facts do you know of that 23 suggests to you that Antioch's EBITDA -- you 24 know what EBITDA is --</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 397</p> <p>1 Q. How significant is that figure 2 relative to the company's sales in influencing 3 EBITDA, if you know?</p> <p>4 A. I do not know.</p> <p>5 Q. Other than what you may have just 6 testified to regarding costs for service 7 providers --</p> <p>8 A. Uh-huh.</p> <p>9 Q. -- what facts do you know that 10 suggest Antioch's enterprise value -- I'm 11 sorry. That's fine. I'll start over. All 12 right.</p> <p>13 Other than what you've just 14 testified to about costs associated with 15 service providers --</p> <p>16 A. Uh-huh.</p> <p>17 Q. -- what facts do you know that 18 suggest Antioch's enterprise value declined 19 because of the sales process?</p> <p>20 A. And how are you defining 21 enterprise value?</p> <p>22 Q. I'm asking you. You have alleged 23 in your complaint that the enterprise value --</p> <p>24 A. Oh, okay.</p> <p>25 Q. -- declined over time, right?</p>



<p style="text-align: right;">Page 398</p> <p>1 A. Yes. I mean --</p> <p>2 Q. The timing is a critical factor in</p> <p>3 all of these claims.</p> <p>4 A. Absolutely. Absolutely.</p> <p>5 Q. So my question is -- to you is</p> <p>6 what facts are you aware of that suggests to</p> <p>7 you that Antioch's enterprise value declined</p> <p>8 because of the sales process?</p> <p>9 A. It declined over the time period</p> <p>10 during the sale process. And I think what</p> <p>11 we're alleging is that because of that, a</p> <p>12 faster sale generates more value than a later</p> <p>13 sale, which is, in fact, what occurred here.</p> <p>14 So, again, aside from the cost of</p> <p>15 the sale process, which is going to reduce the</p> <p>16 value of the company, I suppose, I don't -- the</p> <p>17 sales process itself -- the enterprise value is</p> <p>18 something that's determined by how the company</p> <p>19 is doing, and its sales are continuing to</p> <p>20 decrease with time and it was projected to</p> <p>21 continue to decrease with time. And so the</p> <p>22 more time you go out in the process, the less</p> <p>23 valuable the company is going to be, which</p> <p>24 means you need to sell it sooner rather than</p> <p>25 later.</p>	<p style="text-align: right;">Page 400</p> <p>1 A. New products.</p> <p>2 Q. And the company introduced new</p> <p>3 products, right?</p> <p>4 A. Well --</p> <p>5 Q. It's true, right, they did that?</p> <p>6 I'll withdraw the question. I don't need any</p> <p>7 more on that.</p> <p>8 If I understand the testimony that</p> <p>9 you've given so far, I think you identified the</p> <p>10 J.H. Whitney sale as one that might have gone</p> <p>11 forward or that process but for breaches of</p> <p>12 fiduciary duties by various people involved?</p> <p>13 A. I think that's probably correct.</p> <p>14 And, again, that was sort of the hypotheticals</p> <p>15 that we were talking about earlier.</p> <p>16 Q. The board of directors that got</p> <p>17 terminated favored moving forward with that</p> <p>18 transaction?</p> <p>19 A. Finally at that juncture, yes,</p> <p>20 that's what was going on.</p> <p>21 Q. And that includes Alan Luce and</p> <p>22 Nancy Blair, right?</p> <p>23 A. They were on the board at that</p> <p>24 time.</p> <p>25 Q. They were on the special</p>
<p style="text-align: right;">Page 399</p> <p>1 Q. It's really a factor of sales?</p> <p>2 A. Well, yes, it's a factor of sales.</p> <p>3 Q. And sales could have recovered at</p> <p>4 any time during this process, true?</p> <p>5 A. But the projections were clear</p> <p>6 that they weren't going to.</p> <p>7 Q. But we all know projections can be</p> <p>8 wrong, right? We've seen that.</p> <p>9 A. Well --</p> <p>10 Q. They can be, right?</p> <p>11 A. Sure. But there was --</p> <p>12 Q. You don't have a crystal ball,</p> <p>13 Richard Wiser doesn't have a crystal ball,</p> <p>14 true?</p> <p>15 A. Sure. But you have --</p> <p>16 Q. And if the sales had improved, the</p> <p>17 enterprise value of Antioch would have</p> <p>18 improved, too, true?</p> <p>19 A. Here's the thing, you've got the</p> <p>20 same management that is in control of the</p> <p>21 company during the entire period of the</p> <p>22 decline. And you've got people like Mr. Luce</p> <p>23 in 2004 saying here are the things you need to</p> <p>24 do, Asha, to improve the business in an e-mail.</p> <p>25 Q. And he said new products, right?</p>	<p style="text-align: right;">Page 401</p> <p>1 committee?</p> <p>2 A. Yes, the special committee.</p> <p>3 Q. And they approved going forward</p> <p>4 with J.H. Whitney?</p> <p>5 A. They did.</p> <p>6 Q. And do you recall -- I'll just</p> <p>7 represent to you the approximate figure for</p> <p>8 J.H. Whitney was fifty-four million dollars.</p> <p>9 A. Okay.</p> <p>10 Q. Do you recall how much of the</p> <p>11 fifty-four million would have reached beyond</p> <p>12 the company's institutional debt?</p> <p>13 A. Not a lot, I imagine; but as I</p> <p>14 testified earlier, you had two other parties</p> <p>15 that were interested so the fifty-four million</p> <p>16 was a floor for an auction sale process. At</p> <p>17 least that was the potential that was gone by</p> <p>18 switching up the board.</p> <p>19 Q. And it was the ESOP trustee's</p> <p>20 concern that there would be no money going</p> <p>21 beyond the institutional owners that caused him</p> <p>22 to fire the board of directors, to the best of</p> <p>23 your knowledge, true?</p> <p>24 A. Well, yeah, he was not happy with</p> <p>25 the deal apparently.</p>

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<p>1 Q. I am almost finished. I have a 2 couple more minutes. 3 Let's switch back to topic number 4 two from our notice. If you want to take a 5 look at that. Rather than read it, I'm just 6 going to ask you if you can take a look at 7 topic two -- 8 A. Uh-huh. 9 Q. -- on your own. Are you prepared 10 to testify on that topic? 11 A. Yeah. 12 (Thereupon, Exhibit 792, excerpt of 13 Exhibit 319, was marked for purposes of 14 identification.) 15 BY MR. GENTRY: 16 Q. I'm going to hand you what's been 17 marked Exhibit 792, and 792 is an excerpt of 18 Document 319 from the bankruptcy with just -- 19 actually I need to mark the next one. Can we 20 do that? 21 Exhibit 792 is an excerpt of 22 Document Number 319 from the bankruptcy 23 proceeding. It includes pages ninety-four 24 through ninety-seven, in addition to a cover 25 page. Do you see that?</p>	<p>1 those people in here, if you know? 2 A. To be certain that the claims 3 against those individuals were properly 4 preserved to be -- to be pursued by the 5 Litigation Trust. 6 Q. Have you acquainted yourself with 7 the facts and information relating to contacts 8 with potential defendants before suit? 9 A. We've got a binder on that. Yeah, 10 do we have all of that there, all of the 11 contact stuff? 12 MS. McNICHOLAS: Yes. 13 (Thereupon, Exhibit 793, 14 correspondence from Jeanine McLaughlin, Alan Luce, 15 Denis Sanan, and James Northrop to Miss Andrew or 16 Christina Fischer, was marked for purposes of 17 identification.) 18 BY MR. GENTRY: 19 Q. Let's do this, before we get into 20 the binder, I'm going to hand you Exhibit 465 21 and 793 to look at. 22 MS. ANDREW: This is, what, 793? 23 You're marking this new one? 24 MR. GENTRY: Yes. 25 BY MR. GENTRY:</p>
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<p>1 A. Yes. Uh-huh. 2 Q. This portion of the overall 3 document is a subdocument that's got a title 4 that says list of reorganized Antioch's and/or 5 debtors' business litigation claims and 6 litigation claims. Do you see that? 7 A. Yes. Uh-huh. 8 Q. And, now, this document identifies 9 claims that are being assigned to the 10 Litigation Trust? 11 A. Yes. Uh-huh. 12 Q. And this is January 27th of 2009? 13 A. Yes. 14 Q. The document identifies insiders 15 and noninsiders of the debtors and nondebtor 16 affiliates including but not limited to the 17 following parties -- 18 A. Uh-huh. 19 Q. -- at the bottom of page 20 ninety-five. 21 A. Yes. 22 Q. And there's a long list of people, 23 many of whom are defendants in this case? 24 A. Yes. 25 Q. What was the purpose of listing</p>	<p>1 Q. And for the purposes of the 2 record, Exhibit 465 is a document Bates 3 numbered LUCE00016 through 17 and it's dated 4 August 29th of 2009. It appears to be 5 correspondence from Alan Luce to Marcia Voorhis 6 Andrew of Taft, Stettinius &amp; Hollister. Do you 7 see that? 8 A. I see that, uh-huh. 9 Q. And Exhibit 793 is actually a 10 collection of documents, most of which do not 11 have Bates numbers, but which includes 12 correspondence from Jeanine McLaughlin, Alan 13 Luce, Denis Sanan, and James Northrop to Miss 14 Andrew or Christina Fischer. Do you see that? 15 A. Yes. 16 Q. And to the best of your knowledge, 17 this correspondence -- the dates on the 18 correspondence is accurate? 19 A. These dates here? 20 Q. Uh-huh. August, September of 21 2009. 22 A. That's the right time frame, I 23 would think. 24 Q. And they're all before the Trust, 25 filed suit, right?</p>

<p style="text-align: right;">Page 406</p> <p>1 A. Yes, they are. Uh-huh.</p> <p>2 Q. And all the people that are</p> <p>3 providing this document -- these documents and</p> <p>4 information are people who are listed in</p> <p>5 Exhibit 792 as potential defendants, right?</p> <p>6 A. Yeah, I believe they are. Uh-huh.</p> <p>7 Q. And as to the binder you have in</p> <p>8 front of you, is that correspondence directed</p> <p>9 to these folks generally?</p> <p>10 A. Yeah, it is, I believe. Yeah, in</p> <p>11 that same time frame.</p> <p>12 Q. And for the purposes of our</p> <p>13 topics, to the best of your knowledge, do you</p> <p>14 have all of the correspondence addressed to the</p> <p>15 people that are covered by topic number two in</p> <p>16 our deposition notice?</p> <p>17 THE WITNESS: Okay. But this is the</p> <p>18 earlier stuff?</p> <p>19 MS. ANDREW: Yeah.</p> <p>20 THE WITNESS: Okay. I believe so.</p> <p>21 This looks like just a whole -- a whole bunch of</p> <p>22 the correspondence here.</p> <p>23 BY MR. GENTRY:</p> <p>24 Q. Is any of that correspondence</p> <p>25 Bates numbered?</p>	<p style="text-align: right;">Page 408</p> <p>1 792.</p> <p>2 A. Okay. Let me look and see if I</p> <p>3 can find one here. 793. Oh, to 792.</p> <p>4 MR. SCHEIER: Dan, I'm not sure what</p> <p>5 kind of process you're asking the witness to</p> <p>6 undertake; but if it's going to be a while, we</p> <p>7 should go off the record to preserve time.</p> <p>8 MR. GENTRY: Fair enough.</p> <p>9 BY MR. GENTRY:</p> <p>10 Q. I have some questions -- some</p> <p>11 general questions for you which you may need to</p> <p>12 look at the documents to answer but let me ask</p> <p>13 you some of the questions and see whether you</p> <p>14 can answer them. Fair enough?</p> <p>15 A. Okay. Sure.</p> <p>16 Q. To your knowledge, did you or</p> <p>17 persons acting on your behalf tell the</p> <p>18 potential defendants whether they might be</p> <p>19 sued?</p> <p>20 A. The -- this list that's attached</p> <p>21 to the plan, which was and should have been as</p> <p>22 the plan and the confirmation order were served</p> <p>23 on all parties in the case, and these I believe</p> <p>24 were all parties in the case, we'd have to</p> <p>25 check the certificate of service, but they</p>
<p style="text-align: right;">Page 407</p> <p>1 A. I don't believe that it is. No,</p> <p>2 it's not.</p> <p>3 Q. To your knowledge, has any of it</p> <p>4 been produced in connection with discovery in</p> <p>5 our case?</p> <p>6 A. I'm not aware that it has been.</p> <p>7 Q. And I'm not saying it was covered</p> <p>8 by a request. I don't know.</p> <p>9 A. No, I don't believe that it has</p> <p>10 been.</p> <p>11 Q. Have you had a chance to look at</p> <p>12 the correspondence?</p> <p>13 A. I believe all the letters are</p> <p>14 identical.</p> <p>15 Q. To the potential defendants I</p> <p>16 mean.</p> <p>17 A. Oh, the ones to these -- which</p> <p>18 ones?</p> <p>19 Q. The ones addressed to them? And</p> <p>20 that's -- I think you're looking at it, the</p> <p>21 correspondence.</p> <p>22 A. Yeah, but there's -- it's a bunch</p> <p>23 of -- I mean, you want the ones to these</p> <p>24 particular people?</p> <p>25 Q. Anyone who's listed in Exhibit</p>	<p style="text-align: right;">Page 409</p> <p>1 would have received a copy of the plan that</p> <p>2 would have listed them as potential targets of</p> <p>3 the lawsuit -- of lawsuits, potentially.</p> <p>4 Q. And you're referring to Exhibit</p> <p>5 792?</p> <p>6 A. I'm referring to the plan and the</p> <p>7 confirmation order that, yeah, I guess that's a</p> <p>8 portion of that, right.</p> <p>9 Q. And you're not -- but my question</p> <p>10 is really whether you or people acting on your</p> <p>11 behalf in communications with these people told</p> <p>12 them that they might be sued?</p> <p>13 A. Again, I think these people got</p> <p>14 notice of -- that they were -- this is a public</p> <p>15 record document.</p> <p>16 Q. I'm asking about something other</p> <p>17 than 792. You have a pile of letters in front</p> <p>18 of you --</p> <p>19 A. Yes.</p> <p>20 Q. -- which you've had a chance to</p> <p>21 look at.</p> <p>22 A. Okay.</p> <p>23 Q. Did you or persons acting on your</p> <p>24 behalf tell potential defendants whether they</p> <p>25 might be sued by the Litigation Trust?</p>

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<p>1 A. Why don't we go off the record and</p> <p>2 let me read this.</p> <p>3 Q. Sure.</p> <p>4 A. Okay.</p> <p>5 THE VIDEOGRAPHER: We're off the</p> <p>6 record.</p> <p>7 (Pause in proceedings.)</p> <p>8 THE VIDEOGRAPHER: We're on the</p> <p>9 record.</p> <p>10 MR. GENTRY: Back on the record.</p> <p>11 While we took a break and Mr. Miller reviewed some</p> <p>12 of the correspondence that is responsive to</p> <p>13 30(b)(6) deposition topic number two in our</p> <p>14 notice, plaintiff's counsel and I conferred and</p> <p>15 we've agreed that plaintiff's counsel will produce</p> <p>16 copies of the correspondence and we'll forego</p> <p>17 questioning of Mr. Miller at this time on those</p> <p>18 documents with the understanding that plaintiff's</p> <p>19 counsel will entertain not more than five</p> <p>20 interrogatories from my clients as to the subjects</p> <p>21 covered by the documents that we're agreeing to</p> <p>22 exchange. Did I get that right?</p> <p>23 MS. ANDREW: That's correct.</p> <p>24 MR. GENTRY: All right. And with</p> <p>25 that, I will say no further questions pending the</p>	<p>1 Q. Mr. Miller, my name is Greg</p> <p>2 Otsuka. I represent three defendants in this</p> <p>3 lawsuit, Houlihan Lokey, Inc.; Houlihan Lokey</p> <p>4 Capital, Inc.; and Houlihan Lokey Financial</p> <p>5 Advisors, Inc. I know that I'm on the phone</p> <p>6 and I know it's not ideal. I'll do my best to</p> <p>7 keep my voice up. If at any time you can't</p> <p>8 understand me or you can't hear me or need me</p> <p>9 to speak louder, let me know.</p> <p>10 And I will just say at times</p> <p>11 during today's testimony I've had a little</p> <p>12 difficulty hearing some of your answers so if</p> <p>13 you could do your best to speak into the phone</p> <p>14 and I will let you know if at any time I cannot</p> <p>15 hear you.</p> <p>16 A. I'm happy to do that. Thank you.</p> <p>17 Q. Thank you. Mr. Miller, do you</p> <p>18 have in front of you a document that's been</p> <p>19 marked as Exhibit 794?</p> <p>20 A. Yes, I do.</p> <p>21 Q. Have you seen this document before</p> <p>22 today?</p> <p>23 A. Yes, I have.</p> <p>24 Q. What is it?</p> <p>25 A. It appears to be the Trust's</p>
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<p>1 expiration of all time and turn it over to the</p> <p>2 next lawyer and say thank you very much for your</p> <p>3 time and patience with what must be a pretty</p> <p>4 frustrating process. Thank you.</p> <p>5 THE WITNESS: Thank you.</p> <p>6 MR. GENTRY: Greg, are you ready to</p> <p>7 proceed or do you want us to go off?</p> <p>8 MS. ANDREW: Greg.</p> <p>9 MR. GENTRY: Let's go off the record.</p> <p>10 MR. OTSUKA: I'm sorry, I had it on</p> <p>11 mute. Could we go off real quick?</p> <p>12 MR. GENTRY: Yes.</p> <p>13 THE VIDEOGRAPHER: We're off the</p> <p>14 record.</p> <p>15 (Pause in proceedings.)</p> <p>16 THE VIDEOGRAPHER: We're on the</p> <p>17 record.</p> <p>18 (Thereupon, Exhibit 794, The Antioch</p> <p>19 Company Litigation Trust's response to first set</p> <p>20 of interrogatories of defendants Houlihan Lokey,</p> <p>21 Inc., Houlihan Lokey Financial Advisors, Inc. and</p> <p>22 Houlihan Lokey Capital, Inc., was marked for</p> <p>23 purposes of identification.)</p> <p>24 CROSS-EXAMINATION</p> <p>25 BY MR. OTSUKA:</p>	<p>1 responses to the various, if I may call them,</p> <p>2 the Houlihan Lokey entities, those various</p> <p>3 entities first set of interrogatories.</p> <p>4 Q. And, yes, for clarification, I</p> <p>5 will refer to all of my clients collectively as</p> <p>6 Houlihan Lokey, and if at any time your answer</p> <p>7 depends on one or the other of the defendants</p> <p>8 or you need me to clarify, I'm happy to do</p> <p>9 that.</p> <p>10 A. Okay.</p> <p>11 Q. If you could turn to page sixteen</p> <p>12 of this document. It's titled verification.</p> <p>13 Do you see that?</p> <p>14 A. Yes.</p> <p>15 Q. It states, I am the plaintiff in</p> <p>16 this action and state that the foregoing</p> <p>17 responses to interrogatories are true and</p> <p>18 correct to the best of my knowledge,</p> <p>19 information, and belief. Do you see that?</p> <p>20 A. Yes.</p> <p>21 Q. Is that your signature beneath --</p> <p>22 on this page?</p> <p>23 A. Yes, that is.</p> <p>24 Q. Mr. Miller, what did you do to</p> <p>25 satisfy yourself that these responses were true</p>

<p style="text-align: right;">Page 414</p> <p>1 and correct before you signed the verification?</p> <p>2 A. Well, I, of course, reviewed them</p> <p>3 and discussed them with my counsel and had</p> <p>4 reviewed certain, although probably not all, of</p> <p>5 the various documents that are listed by Bates</p> <p>6 number in -- in the responses.</p> <p>7 Q. Sitting here today, do you have</p> <p>8 any reason to believe that any of these answers</p> <p>9 are no longer true and correct?</p> <p>10 A. Not -- I don't believe so. I</p> <p>11 mean, you know, obviously this was done at an</p> <p>12 earlier point in time in the litigation and</p> <p>13 some amount of information has, you know, been</p> <p>14 obtained since then; but I think by and large,</p> <p>15 you know, I think this is -- I'm not -- I</p> <p>16 didn't see anything in here that, you know, had</p> <p>17 materially changed, I guess.</p> <p>18 Q. I assume if you became aware that</p> <p>19 something in here was inaccurate, you would</p> <p>20 have supplemented your responses accordingly;</p> <p>21 is that right?</p> <p>22 A. Absolutely.</p> <p>23 Q. If I could direct your attention</p> <p>24 to page eleven of the document. Specifically</p> <p>25 the bottom of the page.</p>	<p style="text-align: right;">Page 416</p> <p>1 Q. And listed here are eleven</p> <p>2 breaches of fiduciary duty by other defendants</p> <p>3 that the trust alleges Houlihan Lokey aided and</p> <p>4 abetted; is that correct?</p> <p>5 A. That's what is here, yeah.</p> <p>6 Q. I wanted to walk through some, if</p> <p>7 not all, of these allegations.</p> <p>8 A. Okay.</p> <p>9 Q. Turning to number one --</p> <p>10 A. Uh-huh.</p> <p>11 Q. -- the Trust contends that other</p> <p>12 defendants breached their fiduciary duties by</p> <p>13 failing to obtain an independent opinion as to</p> <p>14 whether the tender offer transaction was fair</p> <p>15 to the company or as to the prudence of the</p> <p>16 underlying business decision to enter into the</p> <p>17 transaction. Is that correct?</p> <p>18 A. Correct. We have alleged that,</p> <p>19 yes.</p> <p>20 Q. Can you tell me, how did Houlihan</p> <p>21 Lokey aid and abet that alleged breach?</p> <p>22 A. Well, I think that the Trust's</p> <p>23 view of that is that Houlihan Lokey was brought</p> <p>24 in to provide a fairness opinion with respect</p> <p>25 to, I guess, the consideration going to the</p>
<p style="text-align: right;">Page 415</p> <p>1 A. Uh-huh.</p> <p>2 Q. And at the bottom of page eleven</p> <p>3 is reprinted the interrogatory number eleven --</p> <p>4 A. Yes.</p> <p>5 Q. -- from my client. Do you see</p> <p>6 that?</p> <p>7 A. Yes.</p> <p>8 Q. And the interrogatory number</p> <p>9 eleven reads, identify and describe with</p> <p>10 specificity every alleged breach of fiduciary</p> <p>11 duty that you claim Houlihan Lokey aided and</p> <p>12 abetted, including the defendant who committed</p> <p>13 each alleged breach. Is that correct?</p> <p>14 A. Yes.</p> <p>15 Q. Do you understand that the Trust</p> <p>16 has sued Houlihan based on claims for aiding</p> <p>17 and abetting breaches of fiduciary duty?</p> <p>18 A. Yes, I do understand that.</p> <p>19 Q. Not an actual breach of any duty</p> <p>20 that Houlihan Lokey owed?</p> <p>21 A. That is correct, yes.</p> <p>22 Q. Turning the page to page twelve,</p> <p>23 thirteen, and fourteen, the Trust's response</p> <p>24 carries over those three pages, correct?</p> <p>25 A. Yes. Uh-huh.</p>	<p style="text-align: right;">Page 417</p> <p>1 nonESOP shareholders as a result of the</p> <p>2 transaction.</p> <p>3 That in connection with their due</p> <p>4 diligence, Houlihan, I believe, knew or should</p> <p>5 have known that the board here was interested,</p> <p>6 that the majority of the value for this</p> <p>7 transaction was going to those selling</p> <p>8 shareholders who were also six of the nine</p> <p>9 board members.</p> <p>10 That Houlihan Lokey has extensive</p> <p>11 experience doing ESOP-type transactions and</p> <p>12 issuing fairness opinions, and that I think,</p> <p>13 you know, that our view is that -- that</p> <p>14 Houlihan had knowledge of all of those things</p> <p>15 and that no one was looking out from a fairness</p> <p>16 standpoint or providing a fairness opinion on</p> <p>17 behalf of the company.</p> <p>18 Houlihan was back and forth with</p> <p>19 Duff &amp; Phelps over the valuation, but it</p> <p>20 wasn't -- there wasn't a three-party</p> <p>21 negotiation there. There were actually three</p> <p>22 constituencies involved, the -- the selling</p> <p>23 shareholders whom Houlihan Lokey was providing</p> <p>24 an opinion to, the ESOP whom Duff &amp; Phelps was</p> <p>25 providing an opinion to, and the company who no</p>



<p style="text-align: right;">Page 418</p> <p>1 one was providing an opinion to.</p> <p>2 And my understanding, at least</p> <p>3 from the documents, that Houlihan was aware</p> <p>4 that there was not an opinion being -- you</p> <p>5 know, that that was a -- those -- that was</p> <p>6 the -- that was what was going on, that there</p> <p>7 wasn't a separate fairness opinion.</p> <p>8 And, in fact, Houlihan then</p> <p>9 subsequently, of course -- you know, this</p> <p>10 fairness opinion issue then is addressed in the</p> <p>11 tender offer document subsequently and, you</p> <p>12 know, in lieu of there being a separate</p> <p>13 fairness opinion for the company and</p> <p>14 particularly in the section of the document</p> <p>15 that pertains to the conflict of interest,</p> <p>16 Houlihan's opinion is cited there for the</p> <p>17 basis -- for the board to have satisfied Ohio</p> <p>18 law on the topic of determining that the</p> <p>19 transaction was fair to the company, yet</p> <p>20 Houlihan knew to a certainty that it was not</p> <p>21 providing that opinion.</p> <p>22 So, you know, I think that's kind</p> <p>23 of it in a nutshell in terms of what I can</p> <p>24 recall as I'm sitting here presently.</p> <p>25 Q. And I'll get to the statements in</p>	<p style="text-align: right;">Page 420</p> <p>1 obligations when, in fact, Houlihan knew that</p> <p>2 its opinion did not go to that -- to satisfy</p> <p>3 that legal obligation, yeah, I think the</p> <p>4 conversation goes like, guys, you can't put our</p> <p>5 opinion in that part of the tender offer</p> <p>6 document because it doesn't go to that issue.</p> <p>7 You need to get somebody else to give that</p> <p>8 opinion to you. That's how that conversation</p> <p>9 goes.</p> <p>10 Q. Okay. So, again, just to be</p> <p>11 clear, is there something separate and apart</p> <p>12 from what language is used in the tender offer</p> <p>13 documents that you're claiming Houlihan did</p> <p>14 that aided and abetted this breach of fiduciary</p> <p>15 duty?</p> <p>16 A. Well, I think that's the most</p> <p>17 obvious one.</p> <p>18 I guess if we look at the -- at</p> <p>19 the back and forth on the warrant issue, and,</p> <p>20 of course, that occurs earlier in time as</p> <p>21 between Houlihan and Duff &amp; Phelps, you know,</p> <p>22 there is the issue of back-and-forth.</p> <p>23 I guess -- you know, I think</p> <p>24 that -- at least as I sit here today, I think</p> <p>25 the issue with the tender offer document just</p>
<p style="text-align: right;">Page 419</p> <p>1 the tender offer documents; but putting any</p> <p>2 statements in the document itself aside for</p> <p>3 now, what specific act did Houlihan do that, in</p> <p>4 your view, aided and abetted this alleged</p> <p>5 breach described in number one?</p> <p>6 A. Well, I would think that to the</p> <p>7 extent that the company is needing to satisfy</p> <p>8 as it does because of the interested directors,</p> <p>9 the requirement of Ohio law that the</p> <p>10 transaction be determined as being fair to the</p> <p>11 corporation, that in lieu of Houlihan allowing</p> <p>12 its opinion to be used for that purpose when,</p> <p>13 in fact, its opinion specifically did not go to</p> <p>14 that issue, Houlihan would have recommended to</p> <p>15 the company that they get an independent</p> <p>16 opinion to be able to cite in that provision of</p> <p>17 the tender offer document. That's one of those</p> <p>18 items.</p> <p>19 Q. Are you saying that based on</p> <p>20 Houlihan's role in the 2003 ESOP transaction,</p> <p>21 Houlihan had the duty of advising the company</p> <p>22 as to what types of opinions it needed to</p> <p>23 obtain to have satisfied its legal obligations?</p> <p>24 A. Knowing that the company was using</p> <p>25 Houlihan's opinion to satisfy the legal</p>	<p style="text-align: right;">Page 421</p> <p>1 in terms of Houlihan's knowledge of the fact</p> <p>2 that it was being used in that fashion and not</p> <p>3 having done something about it is, you know,</p> <p>4 our primary issue with Houlihan with respect to</p> <p>5 the sale process.</p> <p>6 And I think -- or I'm sorry, the</p> <p>7 ESOP note -- the ESOP transaction.</p> <p>8 Q. Is that the end of your answer?</p> <p>9 A. I think so. Let me think a moment</p> <p>10 just over your question if I could.</p> <p>11 THE WITNESS: Could you repeat the</p> <p>12 question to me? I apologize if I've run on there.</p> <p>13 BY MR. GENTRY:</p> <p>14 Q. My question is --</p> <p>15 A. I'm sorry. I've just asked --</p> <p>16 Q. -- apart from --</p> <p>17 A. -- the court reporter to repeat is</p> <p>18 so that you don't have to go to the trouble.</p> <p>19 (Record read.)</p> <p>20 BY MR. OTSUKA:</p> <p>21 Q. I'm sorry if I'm interrupting, but</p> <p>22 was there anything more?</p> <p>23 A. I'm taking a minute, if I could,</p> <p>24 to look back through the interrogatory.</p> <p>25 Yeah, I guess we say in</p>

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<p>1 interrogatory number three -- let's see. By, 2 again -- there appears to be from the 3 documentation and, in fact, from the October 4 30th board meeting minutes confusion with 5 respect to the extent of Houlihan's role and 6 the extent of its opinion, and obviously that 7 carries over into the tender offer document 8 subsequently. 9 But the issue there is, you know, 10 Houlihan does know that the directors are the 11 ones that are taking the dollars out here; and 12 it's a little unclear, I guess, in terms of 13 the -- my recollection of the portion of 14 Mr. Jackson's depo that I reviewed was that he 15 didn't seem to have much of a recollection of 16 anything pertaining to this transaction. 17 And so, you know, I think what the 18 documents appear to indicate to us was that, 19 you know, Houlihan is in this to give the 20 opinion -- the very limited and narrow opinion 21 for the selling shareholders knowing that the 22 selling shareholders are all of the directors 23 and that those dollars, you know, are going out 24 and that ultimately the board both in the 25 tender offer document and what appears to be in</p>	<p>1 fiduciary duties by preparing and distributing 2 a prospectus and proxy statement for their 3 tender offer and merger that was materially -- 4 materially misleading. Is that correct? 5 A. That is the Trust's position, yes. 6 Q. Do you have Exhibit 31 in front of 7 you? 8 A. Yes, I do. 9 Q. What is Exhibit 31? 10 A. It is the tender offer document, 11 right? It's the one that does not have the -- 12 I guess the information that was sent to the 13 participants. 14 Q. Can you point me in Exhibit 31 to 15 the materially misleading statements that you 16 allege are in this document for which Houlihan 17 aided and abetted a breach of fiduciary duty? 18 A. I don't know that I understand the 19 question. 20 MS. ANDREW: Do you want him to 21 repeat his testimony from yesterday as to what he 22 sees as misleading and inaccurate in this 23 document? 24 BY MR. OTSUKA: 25 Q. Well, I want to know which</p>
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<p>1 the board minutes -- meeting minutes of the 2 October 30th meeting appear to be relying on 3 Houlihan's opinion as the basis for why the 4 transaction is fair to the corporation yet 5 Houlihan is saying no, that's not -- not the 6 case. 7 Q. Do you know who advised the 8 company as to what opinions it needed in 9 connection with the 2003 transaction? 10 A. I don't other than I know that 11 McDermott Will &amp; Emery advised them not to get 12 a solvency opinion. 13 But beyond that, I don't know who 14 and, you know, whether they -- whether there 15 was advice with respect to getting that 16 opinion. Clearly the issue is raised by the -- 17 by the provision of the Ohio statute that is 18 quoted in the tender offer document. 19 Q. Let's move on to number three on 20 page twelve -- 21 A. Okay. 22 Q. -- of Exhibit 794. 23 A. Okay. 24 Q. In number three, the Trust 25 contends that certain defendants breached their</p>	<p>1 statements that the Trust contends are 2 materially misleading, the Trust contends 3 Houlihan aided and abetted those -- the 4 breaches of fiduciary duty that it related 5 thereto. 6 A. I guess -- yeah, I mean, I guess 7 we'll go through what we went through 8 yesterday. 9 Q. Well, is the answer all of them or 10 some subset of them that you think Houlihan 11 Lokey should be liable for? 12 A. Well, I think with respect to all 13 of those places where Houlihan Lokey is 14 mentioned and the opinion is mentioned, when 15 the language isn't consistent with what's in 16 the opinion or if it isn't -- or if it is 17 consistent yet doesn't contain the disclaimers 18 with respect to we're not rendering any opinion 19 with respect to whether the company should do 20 this transaction or whether it's fair to the 21 company, and there are several instances of 22 that, and I think I may or may not have put 23 this on the record earlier, but, I mean, I 24 believe I did earlier today, and I apologize 25 we're in hour eight plus and it's all kind of</p>

<p style="text-align: right;">Page 426</p> <p>1 running together in my head, but the -- there  2 were similar statements, I think, made in the  3 pages that are not in this particular exhibit  4 but is in the subsequent exhibit that was sent  5 to the participants that -- you know, that  6 characterize the scope of Houlihan's opinion in  7 a way that was not accurate intended to give  8 the impression that the board had an  9 independent party looking out for the fairness  10 of the transaction to the company and that the  11 purchase price was fair to the company and not  12 just to the selling shareholders.</p> <p>13 And so, you know, there are  14 various -- in fact, I think, you know, even on  15 the very first page, I thought that Mr. Jackson  16 testified that it wasn't -- the language didn't  17 identically track even on the very first page  18 of the document, the language in the opinion --  19 pardon me -- but -- I mean, I think that's what  20 we're talking about. I'm happy to go through  21 that with you more specifically.</p> <p>22 There's also, I recall, mentioning  23 a reference to how Houlihan got to the  24 valuation and the fact that, you know, they  25 were valuing the eight fifty a share based upon</p>	<p style="text-align: right;">Page 428</p> <p>1 understand -- let me phrase it differently.  2 I understand you are contending  3 that there are phrases or language or portions  4 of the tender offer document that are  5 materially misleading, correct?  6 A. Correct.  7 Q. What did Houlihan do or not do  8 that you contend constituted aiding and  9 abetting the promulgation of those misleading  10 statements?  11 A. They didn't cause the company to  12 change them. You know, they -- the e-mail  13 traffic indicates that Houlihan got drafts of  14 that, and I believe that -- got drafts of this  15 document, and I believe that Mr. Jackson  16 testified to that effect, and it wasn't clear  17 as to why, for example, the reference to the  18 Houlihan opinion in the conflicts of interest  19 section, why that wasn't changed or deleted or  20 when it was seen, why somebody didn't say, hey,  21 if you've got to have that under Ohio law, you  22 need to go get a separate opinion.  23 We're still, you know, a month or  24 more away from closing on this transaction. If  25 that's what you've got to do to satisfy Ohio</p>
<p style="text-align: right;">Page 427</p> <p>1 the balance sheet as is and didn't really take  2 into consideration the balance sheet post the  3 transaction in terms of subtracting out the  4 debt piece that I thought was, you know, again,  5 not entirely -- in terms of what the effect of  6 the transaction would be, you know, that piece  7 I thought was questionable or something that  8 possibly required clarification. Those are, I  9 guess, kind of the -- I don't probably fully  10 remember my testimony from yesterday, but those  11 are the two areas.</p> <p>12 It's primarily the use of the  13 opinion and the language with respect to the  14 use of the opinion, particularly in the  15 conflicts section, but elsewhere as well,  16 including the pages sent to the participants  17 that are not part of this exhibit, as well as  18 this issue --</p> <p>19 Q. Okay.  20 A. -- with respect to the, you know,  21 subtracting out the debt as a result of the --  22 of the transaction.  23 Q. Okay. Just so I understand, so  24 the statements that you contend are materially  25 misleading in the tender offer documents -- I</p>	<p style="text-align: right;">Page 429</p> <p>1 law, you can't use our opinion for that  2 purpose, we specifically said it's not -- it  3 doesn't address the impact on the company,  4 whether the company should do it or whether  5 it's fair to the company.  6 Q. Did you believe that Houlihan  7 Lokey had a duty to advise the company as to  8 what it should or should not do to satisfy Ohio  9 law?  10 A. I believe that Houlihan Lokey when  11 it was presented with a document that did not  12 accurately depict its opinion, and Houlihan  13 Lokey knows that this document is going out to  14 however many hundred participants -- ESOP  15 participants there are and the nonselling  16 shareholders, however many of those there are,  17 that it had an obligation to speak up and say,  18 hey, you can't use our opinion in this document  19 in a way that it's not accurate or that  20 misleads these folks as to, you know, it  21 satisfying Ohio law because the opinion  22 specifically does not address the issue that  23 Ohio law requires -- you know, is geared toward  24 satisfying.  25 Q. Okay. Looking at number four on</p>

<p style="text-align: right;">Page 430</p> <p>1 page twelve of this exhibit -- I'm sorry, on 2 Exhibit 794 -- 3 A. Yeah. 4 Q. -- if you could just read that. 5 I'm not going to read it into the record. If 6 you could just read that to yourself. 7 A. Yeah. 8 Q. Let me know when you're done. 9 A. Okay. I'm done. 10 Q. Okay. If my question is for 11 number four what did Houlihan do to aid and 12 abet this breach of fiduciary duty, would your 13 answer for number four be different than it was 14 for number three? 15 A. Well, one of the other issues that 16 we had with the tender offer document, and, 17 again, the document that Houlihan has received 18 and reviewed and hopefully is knowledgeable in 19 this area, Houlihan knows that the company is 20 going negative equity is how they referred to 21 it or balance sheet insolvent as a result of 22 the transaction, and Houlihan is a 23 sophisticated financial player, and looking 24 through the risk factors it should be evident 25 that there's no indication of a risk factor,</p>	<p style="text-align: right;">Page 432</p> <p>1 BY MR. OTSUKA: 2 Q. -- on the interest -- 3 MR. GENTRY: This is Dan Gentry. 4 We're close to the end of a tape. If you don't 5 mind taking a break, we'll change tapes. 6 MR. OTSUKA: Not at all. Thanks, 7 Dan. 8 THE VIDEOGRAPHER: We're off the 9 record. 10 (Pause in proceedings.) 11 THE VIDEOGRAPHER: We're on the 12 record. 13 BY MR. OTSUKA: 14 Q. All right. Mr. Miller, I'm 15 actually going to skip ahead to number six on 16 page thirteen of Exhibit 794. 17 A. Okay. 18 Q. In number six the Trust alleges 19 that other defendants breached their fiduciary 20 duties by engaging multiple professionals with 21 inconsistent objectives to sell, refinance, 22 and/or recapitalize the company, thereby 23 jeopardizing realistic alternatives for the 24 company and wasting the company's assets. Do 25 you see that?</p>
<p style="text-align: right;">Page 431</p> <p>1 that this might be a fraudulent conveyance 2 and -- or might be avoided as such because the 3 company is being rendered balance sheet 4 insolvent as a result. 5 And so I don't think, you know, 6 for, you know, the fee incurred that, you know, 7 certainly part of the service, I would presume, 8 would be to, you know, take a look at it and 9 make sure the document is accurate as to these 10 financial things, that it doesn't strike me as 11 unreasonable to think that somebody might have 12 said something about that from Houlihan's 13 standpoint, that, hey, you know, here's a risk 14 factor that you might want to consider. 15 Q. Houlihan should have advised the 16 company as to what the tender offer document 17 should say with respect to certain risk 18 factors; is that what you're saying? 19 A. Well, I think in terms of that 20 particular breach, yes. 21 Q. Okay. Moving on to number five. 22 In number five the Trust alleges that certain 23 other defendants breached their fiduciary duty 24 by focusing -- 25 MR. GENTRY: Greg.</p>	<p style="text-align: right;">Page 433</p> <p>1 A. Yes, I do. 2 Q. What are the realistic 3 alternatives that are referred to in this 4 answer? 5 A. I think the 363 sale process. 6 Q. And was Houlihan hired by the 7 board to pursue a -- to find a buyer that 8 ultimately would buy the company either out of 9 court or in a 363 process? 10 A. Yes, I -- yes, initially that 11 was -- yes. 12 Q. To your knowledge -- I'm sorry? 13 A. I'm done answering. Yes. 14 Q. To your knowledge, did Houlihan 15 Lokey actually pursue those alternatives? 16 A. It appears that they -- my 17 understanding is that they were engaged in 18 March of '07 and commenced a process ultimately 19 in the summer of '07 that was geared toward, 20 you know, a -- finding a buyer for the company 21 under circumstances where the company is not 22 distressed, I guess, for lack of a better term. 23 I'm sure there's a better term, I'm just not 24 thinking of it right now. 25 And that after the initial</p>

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1 indications of value came in late summer, early  
2 fall, the engagement from Houlihan's  
3 perspective changed to a -- really more of a  
4 distressed-type of transaction, which is when I  
5 understand Mr. Spencer became involved on  
6 behalf of Houlihan and, you know, the focus  
7 shifted there to more of a -- to a 363-type  
8 process, at least from -- I think from his  
9 perspective, as I understood the portion of  
10 the -- of his testimony that I reviewed.

11 And I do think he indicated that  
12 they investigated -- what did he refer to it  
13 as -- maybe loan-to-own-type companies in the  
14 late 2007 time frame, if I'm recalling that  
15 correctly. But I think the focus was -- or  
16 should have been the 363 sale process.

17 Q. Let me ask you this: With respect  
18 to the alleged breach of fiduciary duty  
19 described in number six, what did Houlihan  
20 Lokey do to aid and abet these other defendants  
21 jeopardizing realistic alternatives?

22 A. Mr. Spencer struck me as -- and I  
23 was not at his deposition, did not see the  
24 video but just from, again, what portion of the  
25 deposition I read, he struck me as somebody who

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1 was fairly knowledgeable and experienced and,  
2 frankly, pretty bright in terms of the  
3 distressed asset sales and 363-type sales.

4 And as consistent with the e-mail  
5 traffic that I -- you know, we see from him as  
6 well through the process, my sense of it was  
7 that he concluded pretty early on that this --  
8 the only way this thing is going to sell is a  
9 363 sale.

10 And, in fact, I thought he  
11 testified to the effect that, you know, they  
12 agreed to modify their -- Houlihan agreed to  
13 modify its engagement letter in the January '08  
14 time frame to create, I guess, some space for  
15 Candlewood to bring in a transaction that was  
16 not a change in control transaction. That  
17 Houlihan would be entitled to a commission if  
18 it was a change in control 363 or a change in  
19 control outside of court because -- and he was  
20 willing to do that because he thought it highly  
21 unlikely that Candlewood would ever be able to  
22 do any transaction here that wasn't a change in  
23 control transaction.

24 And so, you know, the issue, I  
25 guess, in my mind is knowing in the -- you

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1 know, when you're getting involved in this  
2 thing, October, November time frame -- I guess  
3 he said he got involved in September but let's  
4 give him thirty days to get up to speed, that  
5 the indications of value are where they are and  
6 this thing, if it's going to go is only going  
7 to go in a change of control transaction and  
8 you know that Candlewood isn't pursuing a  
9 change in control transaction. They're  
10 pursuing a transaction that leaves the Morgan  
11 family in control, and you have very little  
12 belief in their two or three, I think, e-mails  
13 that I can think of subsequently where  
14 Mr. Spencer is saying how unlikely it is he  
15 thinks that Candlewood is going to be able to  
16 do anything, you know, bring any deal to the  
17 table. Why is it you don't just say to the  
18 board, look, you need to do a 363 sale. You  
19 want to maximize value here, do the 363 sale,  
20 and get it done.

21 And, you know, if you're not going  
22 to follow our advice, then, fine, you know,  
23 basically to a point where, you know, look, if  
24 you want to go the Candlewood route, which we  
25 think is highly unlikely of ever getting done,

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1 you know, go that way but, you know, we're not  
2 going to run a competing process next to you  
3 that, you know, you're not going to ultimately  
4 go with when we're advising you that the  
5 process that we're wanting you to pursue is  
6 really the only viable way of maximizing the  
7 value here.

8 Q. Do you know if Houlihan ever  
9 advised the board or the special transaction  
10 committee that it should pursue a 363 sale  
11 process?

12 A. I thought from Mr. Spencer's  
13 testimony that, you know, that was -- I guess  
14 that was the take-away that I had, that he  
15 viewed this as being 363 -- at least a change  
16 in control process -- a change in control sale  
17 was the most likely to occur here, so much so  
18 that he was willing to, you know, concede to  
19 Candlewood a nonchange in control sale and felt  
20 very comfortable with that risk, if you will,  
21 in terms of getting his fee paid. And -- I'm  
22 sorry, I've already lost my train of thought.  
23 Could you please read me back the question?

24 Q. Let me ask you a different  
25 question because what I'm trying to understand

53 (Pages 434 to 437)



<p style="text-align: right;">Page 438</p> <p>1 is, do you take issue with the recommendation 2 that Houlihan made to the board or the special 3 transaction committee -- let me ask you that? 4 A. What recommendation are you 5 talking about? 6 Q. The recommendation that the most 7 prudent path to take is to pursue a 363 sale or 8 a change of control transaction. 9 A. No. Again, I think it's the 10 Trust's position that, you know, when it was 11 clear that there wasn't value in this deal that 12 was going to satisfy all the creditors in full 13 in the fall of '07 time frame, that the company 14 needed to move to a Section 363 sale process at 15 that juncture to maximize value knowing that, 16 you know, internally the projections were 17 showing that the sales decline was continuing 18 and there wasn't going to be -- there wasn't an 19 end to that or at least, you know, short term 20 and that more investment needed to be made in 21 the company and the company didn't have an 22 ability to make that investment because, you 23 know, all its assets were liened up. So, you 24 know, no, we don't take issue with recommending 25 that a 363 sale be pursued by the board -- or</p>	<p style="text-align: right;">Page 440</p> <p>1 confusing that with somebody else. 2 But in any event, the theme was 3 the same that Houlihan didn't have a lot of 4 confidence in Candlewood being able to bring a 5 deal that's going to maximize value here. In 6 fact, as I said, was willing to bet their fee 7 on it and didn't force the issue with the board 8 to say, hey, you know, you need to choose. You 9 know, either take us or not. 10 And, you know, there is -- because 11 they were being paid a monthly fee after a 12 certain point in time, there's not necessarily 13 a downside to Houlihan from the delay but 14 there's definitely a downside to the company 15 from the delay. 16 So, I mean, I guess, you know, my 17 view of it is, this guy was very bright, he 18 knew what he was doing, he knew how the 363 19 sale proces worked. The indications are he 20 shared that with the board and he certainly 21 shared his misgivings about Candlewood with the 22 board and others, and he certainly -- he had 23 some very cogent rejections of the various 24 proposals that Morgan and Candlewood came 25 forward with at various points in time as to</p>
<p style="text-align: right;">Page 439</p> <p>1 by the special committee. 2 Q. Okay. Can you tell me then, in 3 connection with the 2007, 2008 sale process, 4 and there's a whole host of alleged breaches of 5 fiduciary duty that you allege in the answer, 6 my question is, what do you allege Houlihan did 7 to aid and abet these breaches of fiduciary 8 duty? 9 A. They, I guess, in a nutshell, 10 maybe, went along to get along sort of with the 11 board and with Candlewood when they should have 12 really been pushing the board and the special 13 committee given the knowledge and expertise 14 that Mr. Spencer seems to have had in this 15 area, that they really should have insisted on 16 the company maximizing its value through the 17 363 process sooner rather than later and not 18 allowing the board to get sidetracked with 19 proposals from Lee Morgan that Houlihan was 20 consistently saying, you know, these don't make 21 any sense and is consistently saying, you know, 22 I think it's highly unlikely that Candlewood is 23 going to be able to bring something here 24 because -- and talking about the lack of 25 sophistication of Candlewood. And I may be</p>	<p style="text-align: right;">Page 441</p> <p>1 why they wouldn't work and yet, you know, he 2 went along to get along and, you know, for a 3 while they -- you know, the deal sits on hold 4 because their exclusivity is granted to GSC, 5 which is a company that, you know, Houlihan 6 knows and thinks highly unlikely that it's 7 going to do this deal once they see the numbers 8 and have a real feel for the company. 9 And, you know, all these things 10 where it -- you know, the impression is rather 11 than giving their, you know, un -- I'm sorry -- 12 giving their best advice to the special 13 committee with respect to how to maximize value 14 here, they kind of went along with this process 15 that ultimately never resulted in the company 16 being able to maximize value. 17 Q. Are you contending that Houlihan 18 did not convey to the special transaction 19 committee Houlihan's opinion that the best way 20 to maximize value was through a change of 21 control transaction? 22 A. No, I'm not contending that. 23 I'm -- 24 Q. I just want to be clear -- 25 A. Yeah.</p>

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1 Q. -- is your contention or your  
2 claim against Houlihan, it's not based on the  
3 actual advice or opinions that it conveyed to  
4 the special transaction committee, is it?

5 A. Well, only in the sense that  
6 Houlihan wasn't saying to the special  
7 transaction committee you need to get this  
8 thing sold, you need to maximize value, you  
9 need to give us instructions to go back to Sun  
10 Capital with, for example, and not let that go  
11 away. And, again, as I indicated yesterday, we  
12 don't know precisely why that went away,  
13 whether that was Houlihan or whether that was  
14 the special committee. Don't know. But, yeah,  
15 I mean --

16 Q. So if there is evidence that  
17 Houlihan did, in fact, communicate with the  
18 special transaction committee saying just what  
19 you said, we need to get this sold, this is the  
20 best way to maximize value through a change of  
21 control transaction, then you have no issue  
22 with what Houlihan did?

23 A. No, that's not true because even  
24 if they said that, that's not what they  
25 insisted that the board do. They went along

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1 then with a process that didn't result in that  
2 occurring in any sort of prompt fashion.

3 You know, you don't get to --  
4 they're in February with three potential  
5 bidders for a 363 sale and the process goes on  
6 hold for thirty days while they sit passively  
7 by, you know, watching the special committee  
8 do -- give exclusivity to GSC, an entity that  
9 they say in e-mails, you know, they don't think  
10 there's any high likelihood the deal is going  
11 to get done.

12 Q. Who has ultimate authority to make  
13 decisions on what direction the company is  
14 going to follow in terms of whether it will  
15 pursue a sale process, whether it would pursue  
16 or consider a recapitalization alternative?

17 A. The board of directors.

18 Q. Not Houlihan?

19 A. But not Houlihan.

20 Q. When you said that Houlihan should  
21 have insisted, was your word, insisted to the  
22 board that it take a course of action --

23 A. Uh-huh.

24 Q. -- what did you mean by that? How  
25 can Houlihan dictate what the board does?

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1 A. Well, you know, it would start  
2 with an e-mail, something in writing that we  
3 haven't seen that indicates very clearly here's  
4 what they ought to do and here's why they ought  
5 to do it and here's the importance of  
6 maximizing value in this process and here's,  
7 you know, what you need to do and --

8 Q. Well, wait. You said that  
9 Houlihan did give that advice.

10 A. The testimony was to the effect  
11 that it was verbal. I've not seen the e-mail.  
12 If you've got an e-mail where they do that, say  
13 that to the board in the, you know, fall of '07  
14 time frame, I'd be happy to see it. I haven't  
15 seen that e-mail --

16 Q. Wait.

17 A. -- but --

18 Q. So you have reason to believe that  
19 Houlihan never gave the advice to the board  
20 that it should pursue a change of control  
21 transaction? Is that right?

22 A. No. There's a difference between  
23 giving advice verbally, which is what I  
24 understood Mr. Spencer's testimony to indicate,  
25 and actually putting the advice in writing; and

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1 I don't see that they put the advice in  
2 writing.

3 Q. So if Houlihan would have written  
4 an e-mail to the special transaction committee  
5 saying we believe that the best course of  
6 action for The Antioch Company to maximize  
7 value is to pursue a change of control  
8 transaction, that would satisfy you?

9 A. And then when the special  
10 transaction committee despite that advice does  
11 not pursue that transaction, then why is  
12 Houlihan still involved? I mean, they've --

13 Q. Okay.

14 A. -- given their best advice to the  
15 client -- and here's the other thing, the  
16 impact would be, I suppose, potentially with  
17 the bank because the bank is expecting Houlihan  
18 to be involved and running the sale process,  
19 and when -- if Houlihan says to the bank we  
20 can't -- you know, they won't let us run the  
21 sale process -- and, again, timingwise it's  
22 kind of some juncture whenever the banks are  
23 looking to do this, you know, that might put  
24 the board in a position where they've got to do  
25 something or at least get -- at least it gets

55 (Pages 442 to 445)

<p style="text-align: right;">Page 446</p> <p>1 Houlihan out of the line of fire, it seems to 2 me, in terms of an aiding and abetting type of 3 claim. 4 Q. So according to you, what Houlihan 5 should have done in order to avoid being sued 6 here was to go to the banks and tell the bank 7 that this is what's happening because the bank 8 was not aware? 9 A. No. What I'm saying is that they 10 should go to the board, and they should have 11 been very explicit with the board, and if they 12 had to be explicit in writing, that would have 13 been even better, to say to the board here's 14 our -- in our professional judgment, here's 15 what you should do. And if you're not going to 16 follow our professional judgment, we're not 17 going to continue to facilitate you doing -- 18 you know, going in a -- pursuing an -- you 19 know, a course that is not consistent with what 20 is our best professional judgment in this 21 situation. 22 Q. Well, you just told me that it's 23 not up to Houlihan, it's up to the board what 24 path to take. So how can Houlihan dictate to 25 the board which path to take?</p>	<p style="text-align: right;">Page 448</p> <p>1 happen? 2 A. Well, Houlihan saying follow our 3 advice or we're going to withdraw. 4 Q. Well -- well, I understand they 5 didn't say that. I'm asking -- Houlihan 6 provided advice to the board, correct? 7 A. It's not clear when they provided 8 the 363 advice, at least from what I can tell. 9 Q. Okay. According to you, when 10 should Houlihan have gone to the board and 11 said, follow our advice or we will withdraw? 12 A. Well, I think there were various 13 points in time. 14 Q. What's the earliest one? 15 A. I think the earliest one is 16 probably in the November, December 2007 time 17 frame. And that's driven by the fact that 18 you've got your indications of value in in late 19 summer or early fall, not enough value here to 20 pay -- cover the debt. You know that this is 21 going to a distressed situation. Candlewood 22 and Lee Morgan come in with a proposal that, I 23 think, Houlihan doesn't think much of at that 24 time in early November. Lee Morgan sends an 25 e-mail in mid November saying he isn't going to</p>
<p style="text-align: right;">Page 447</p> <p>1 A. Well, Houlihan can say here's our 2 professional judgment. You're paying us for 3 our professional judgment. If you're going to 4 ignore our professional judgment, you know, we 5 should go do other deals. We shouldn't be 6 taking the company's money knowing that the 7 company isn't going to follow our advice and is 8 going to do -- and not follow our advice to the 9 company's detriment because the value is 10 decreasing with time. 11 Q. So to cut to the chase, are you 12 saying that if Houlihan gave the special 13 transaction committee its opinion that the best 14 way to maximize value was to pursue a sale 15 transaction and the board chose not to follow 16 that advice, Houlihan should have withdrawn? 17 A. I think that's pretty close to 18 what I'm saying. 19 Q. Okay. At what point should -- in 20 your opinion, should Houlihan have withdrawn 21 then? 22 A. Well, again, because those things 23 didn't happen, it's a little hard to say; but 24 it seems to me that things -- 25 Q. Well, which of those things didn't</p>	<p style="text-align: right;">Page 449</p> <p>1 put more money into this thing. He's already 2 made enough sacrifices. And at that juncture 3 you've got Sun Capital out there who has an 4 expression of interest that Houlihan is saying 5 let's go back to these people with something. 6 The company's finance team comes back with a 7 proposal for that, and it's unclear what 8 happens to Sun Capital from there or, frankly, 9 what goes on between there and, say, early 10 January when Lee Morgan sends a letter saying, 11 you know, I'm real unhappy about being kept out 12 of the loop of everything here. I want to be 13 involved in the special transaction committee 14 stuff. I'm not going to waive any of my 15 subdebt, and all of that stuff, and I want, you 16 know, basically Candlewood involved in the 17 process on the go-forward and more information 18 from Houlihan. And, you know, at that juncture 19 again Houlihan has another opportunity there to 20 say, hey, you know, we're not going to do that. 21 You've got the CEO of the company out wanting 22 to run a competing transaction to what we're 23 doing and, you know, that's not -- they're out 24 there running interference. 25 And they ultimately ran into</p>

<p style="text-align: right;">Page 450</p> <p>1 issues in April of confusion as between -- at  2 least with Marlin, you know, with Candlewood  3 out there pursuing one sort of transaction  4 while Houlihan is pursuing another.  5 Q. Okay. Let me stop you. I  6 appreciate the answer but I'm running short on  7 time. Let me just see if I can shortcut this a  8 little bit.  9 So you said in November, December  10 2007 -- is it correct that in that time frame  11 the board chose to follow a dual path process?  12 A. Yes.  13 Q. And it's your view that the board  14 should have focused solely on finding a buyer  15 in a change of control transaction; is that  16 correct?  17 A. Correct. And what is in -- you  18 know, would be most likely a 363-type  19 transaction.  20 Q. Okay. If Houlihan would have  21 withdrawn at that point, do you believe the  22 board would have been more likely to focus  23 solely on finding a buyer once Houlihan is  24 withdrawn?  25 A. Maybe, maybe not. I don't know</p>	<p style="text-align: right;">Page 452</p> <p>1 Houlihan withdrawing as the company's  2 investment banker?  3 A. I think the company would have  4 benefited from the board having been given, you  5 know, Houlihan's clear and unequivocal advice  6 with respect to how best to maximize the value  7 of the company at this point in time. And I  8 don't think -- while, again, there's indication  9 that Houlihan spoke to the special committee in  10 terms of what its preference was, it certainly  11 went along with a process that clearly didn't  12 result in maximizing the value and also,  13 frankly, you know, it was a process that  14 Houlihan thought wasn't going to work, I mean,  15 in terms of Candlewood being able to bring  16 somebody else on a nonchange in control basis.  17 And that was even more so once Houlihan found  18 out about the fact that the ESOP notes were not  19 adequately secured.  20 Q. Well, but we -- you've agreed that  21 Houlihan advised the board that it should  22 pursue a change of control transaction, and I  23 understand that you think that that advice  24 should have been in writing rather than  25 verbal --</p>
<p style="text-align: right;">Page 451</p> <p>1 what the board would have done.  2 But from Houlihan's perspective is  3 what you're asking me to look at this for, I  4 mean, I don't see an issue with Houlihan  5 saying, you know, we've given them our best  6 advice, this is what they ought to do. They  7 don't want to do it so, you know, we're not  8 going to continue to take their money and we're  9 not going to continue to participate in a  10 process that we don't think is going to  11 resolve -- or has a very high likelihood at all  12 of resulting in a successful -- successful  13 sale.  14 Q. Well, let me ask you this: Whose  15 interest do you represent?  16 A. We represent the Litigation Trust.  17 Q. So --  18 A. And ultimately --  19 Q. -- you look at this from the  20 standpoint of what benefits the company; is  21 that right?  22 A. Yeah. Ultimately we are in the  23 shoes of the company; that's correct.  24 Q. Okay. So how would the company  25 have benefited in November, December 2007 from</p>	<p style="text-align: right;">Page 453</p> <p>1 A. Well --  2 Q. -- however --  3 A. It's just not clear to me when --  4 when precisely that advice was given --  5 Q. So wait. So you're not taking --  6 A. -- and how it was given.  7 Q. Your questions are not about  8 whether it was clear and unequivocal advice,  9 your issue is in what form and when?  10 A. No. The questions are about clear  11 and unequivocal. I mean, if I don't know  12 precisely what form and when, I don't know how  13 clear and unequivocal the advice was.  14 Q. Okay. But to continue with --  15 your position is that Houlihan, once it gave  16 its advice to the board that it should pursue a  17 sale transaction and the board chose to follow  18 a dual path transaction, in that instance  19 Houlihan should have withdrawn and they would  20 not be sued right now; is that right?  21 A. Well, I think from the company  22 standpoint, you know, if the board doesn't  23 follow the advice of its professionals, then  24 that's on the board. But if the professionals  25 aren't clearly and unequivocally giving the</p>

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<p>1 advice and going along with the board pursuing 2 a path that is not in the best interest of the 3 company, then that's where the aiding and 4 abetting piece comes in, it seems to me. 5 Q. Once the board decided to follow 6 what I'm calling the dual path strategy, was 7 Houlihan still out looking for potential 8 buyers? 9 A. Yes, it's my understanding that 10 they were. 11 Q. And by Houlihan continuing to 12 search for potential buyers, are you contending 13 that that harmed the company? 14 A. No, not at all. 15 Q. So if Houlihan had withdrawn as 16 soon as the dual path strategy was chosen, 17 would that not have harmed the company because 18 then there's no one out there looking for a 19 potential buyer? 20 A. Well, I think there are a host of 21 things that potentially could or could not have 22 arisen from Houlihan's, you know, withdrawing. 23 As we sit here today, we don't know what, you 24 know, all those might be. But -- 25 Q. So you have -- you have no reason</p>	<p>1 explore a recapitalization transaction through 2 Candlewood? 3 A. It certainly -- I think the 4 e-mails certainly indicate that Houlihan was on 5 board for this dual track process after that 6 January, you know, 2nd e-mail. 7 Q. So after the board indicated that 8 it was going to follow the dual track process, 9 Houlihan continued to look for a buyer, 10 correct? 11 A. Correct. 12 Q. And, in fact, Houlihan found 13 potential buyers, didn't they? 14 A. It did. 15 Q. And did Houlihan finding potential 16 buyers, did that harm the company? 17 A. No, not -- no. Huh-uh. 18 Q. You testified -- switching gears. 19 You testified that Houlihan at some point 20 sought an amendment to its engagement letter by 21 obtaining what we've referred to as a carve-out 22 for the payment of its fees. Do you remember 23 that? 24 A. Yes, that was -- yes. Uh-huh. 25 Q. Do you claim that by seeking a</p>
Page 455	Page 457
<p>1 to think that Houlihan withdrawing as the 2 company's investment banker in November or 3 December of 2007 would have benefited the 4 company in any way, do you? 5 A. Well, it would have -- it would 6 have not had a professional advisor, Houlihan, 7 on board for and continuing along in a process 8 that, in our view, was the directors breaching 9 their fiduciary duty by not maximizing the 10 value through the most likely means to maximize 11 value for the company at that time. 12 Q. But how was Houlihan continuing to 13 be the investment banker, how was that harming 14 the company? 15 A. Well, it's being the investment 16 banker while they know that there's another 17 competing process going on that they know and 18 their belief is has a very low likelihood of 19 bringing anything successful, and that 20 ultimately results in some confusion among the 21 bidders, as evidenced by the e-mails, and a 22 significant amount of delay in terms of getting 23 to deals with potential purchasers. 24 Q. Did Houlihan advise the board that 25 it should follow this dual path strategy and</p>	<p>1 carve-out, Houlihan somehow aided and abetted 2 any breach of fiduciary duty? 3 A. No. It wasn't seeking the 4 carve-out that was the issue. 5 Q. What was the issue? 6 A. The issue was, you know, basically 7 doing the -- as I understood Mr. Spencer's 8 testimony, the scope of the definition -- 9 defined term transaction was such that it 10 apparently created space for Candlewood to get 11 a fee if their -- if they could come forward 12 with a recapitalization transaction that did 13 not involve change in control but, from 14 Mr. Spencer's view, anything that involved a 15 change of control Houlihan would be able to 16 get. 17 So instead of -- you know, 18 basically Houlihan had an exclusive deal here 19 and instead of insisting on their exclusivity, 20 they agreed to let somebody else come in and 21 that somebody else isn't some independent third 22 party that's out there that has some unique 23 source or access to capital, the somebody else 24 is the financial advisor to the CEO who doesn't 25 want to sell the company when Houlihan is</p>



<p style="text-align: right;">Page 458</p> <p>1 saying that the best result here and the best 2 way to maximize value is to change control. 3 So it's not like, you know, 4 there's some unique thing that Candlewood is 5 providing. There -- what they're -- they're 6 allowing space in their exclusivity under their 7 agreement with the company to have somebody 8 come in and interfere with their sales process. 9 Somebody who they know doesn't want to sell, 10 doesn't want to do a change in control process. 11 Q. Okay. Let me stop you there. Can 12 we go off the record? 13 A. Sure. 14 THE VIDEOGRAPHER: We're off the 15 record. 16 (Pause in proceedings.) 17 THE VIDEOGRAPHER: We're on the 18 record. 19 MR. OTSUKA: Mr. Miller, we checked 20 the time. I'm out of time. Thank you for your 21 time. I appreciate it. 22 THE WITNESS: Thank you. 23 FURTHER CROSS-EXAMINATION 24 BY MR. SCHEIER: 25 Q. Tim, hi. Because you asked for</p>	<p style="text-align: right;">Page 460</p> <p>1 see the goods and then order them from the 2 consultants. 3 Q. And so is it my understanding 4 that -- is my understanding correct that 5 consultants would sell product through a party 6 they would put together in their homes or 7 another location and once they made those 8 sales, they would then put an order in with the 9 Creative Memories division of Antioch who would 10 then fulfill that order, send it out to the 11 consultants who would then deliver it to the 12 consultants' customers; is that right? 13 A. That's my understanding of how it 14 worked. 15 Q. Okay. Can you identify for me 16 what aspect of the 2003 transaction, if any -- 17 A. Uh-huh. 18 Q. -- contributed to or caused the 19 decline in sales by Creative Memories 20 consultants to their customers out in the 21 field? 22 A. What I've seen in the e-mail 23 transaction -- or e-mail on that topic is the 24 issue of in the 2004 and on time frame and 25 maybe, I guess, e-mail traffic in the 2005,</p>
<p style="text-align: right;">Page 459</p> <p>1 another four minutes' worth of questions, I'm 2 going to ask you one. 3 A. I don't think that accurately 4 reflects but okay. 5 Q. All right. Fair enough. You're a 6 lawyer after all, right? 7 Is it fair to say that the 8 declining enterprise value in The Antioch 9 Company between 2003 and 2008 was driven 10 primarily by its declining sales and revenues? 11 A. That's difficult to say, and I 12 will say that it is something that we would 13 also defer to expert testimony on. 14 But from what the evidence that 15 we've seen is that there's declining 16 productivity. There's declining consultant 17 count. Activity rate is up and down -- 18 Q. Well, let me ask you this. 19 A. -- but -- 20 Q. Is the company -- how did The 21 Antioch Company, to the best of your knowledge, 22 from its Creative Memories division, sell its 23 products? 24 A. Through consultants at parties 25 where the consultants would come and, I guess,</p>	<p style="text-align: right;">Page 461</p> <p>1 2006 traffic, maybe '07 time frame of a notion 2 that sales are declining, that things need to 3 be done in terms of new product line, new other 4 sorts of things beyond consultant compensation 5 and that sort of stuff, that it requires the 6 investment of funds and that the company 7 doesn't have the funds to invest. 8 And that appears as well -- you 9 know, the capital constraints of the company 10 appear also, for example, in Houlihan's 11 PowerPoint that they do to try to -- in May 12 of '07 to try to go get a new ESOP trustee 13 involved. And there are other references to 14 that post. 15 So, I mean, there's clearly an 16 impact -- or an acknowledged impact of the ESOP 17 transaction on drawing up the company's 18 liquidity and ability to respond to the 19 declining sales that were starting in 2002, 20 2003 time frame. 21 Q. And what aspect of the 2003 22 transaction in particular, in your mind, 23 contributed to the inability of the company to 24 devote cash to certain areas that you think 25 they needed to devote cash in terms of product</p>

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1 development and so forth?

2 A. The fact that you're taking so  
3 much value of the company, two hundred and  
4 forty-four million dollars, rendering the  
5 company somewhere between seventy-five and  
6 ninety-one, depending on the numbers, balance  
7 sheet insolvent and then -- you know, and doing  
8 that without really, I think, taking  
9 consideration of the potential repurchase  
10 liability when you've got forty or more people  
11 that are going to be millionaires as a result  
12 of this or could be more than that, and these  
13 folks are cashing out, and just, you know --  
14 all of that liquidity drain from that  
15 transaction was an overhang on the company that  
16 it never got out from under.

17 Q. Do you know what the company's  
18 actual repurchase liability was and cash needs  
19 were in the 2004 through 2006 period?

20 A. I understood that there were eight  
21 hundred employees who left --

22 Q. No, I'm asking from a cash  
23 perspective.

24 A. I'm sorry. From a cash  
25 perspective, a hundred and ninety million

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1 dollars -- that's not the cash piece. That  
2 would be the cash and debt.

3 Q. If you'd just pay attention to the  
4 question because we're short on time.

5 A. I'm sorry.

6 Q. Do you have an understanding from  
7 the materials you reviewed --

8 A. Uh-huh.

9 Q. -- of what the company's cash  
10 needs were to fund the repurchase liabilities  
11 in 2004, 2005, and 2006?

12 A. As I sit here presently, no, but  
13 I'm sure the information can be obtained. I  
14 mean --

15 Q. Well, you were supposed to have  
16 prepared for the deposition and have that  
17 information with you. But to the extent you  
18 don't, did you take into account --

19 MS. ANDREW: He didn't say he didn't  
20 have it with him. He said he doesn't have it in  
21 his head. That's a different --

22 BY MR. SCHEIER:

23 Q. Do you want to take a look?

24 A. Well, what the cash needs were for  
25 the repurchase obligations?

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1 Q. Yes, sir.

2 A. Well, whatever they were, the  
3 company was satisfying the cash needs as it  
4 went until the summer of 2008.

5 Q. Uh-huh.

6 A. But they were also incurring a  
7 significant amount of debt. And the debt  
8 picture doesn't change really over the --

9 Q. Well, that's what I'm trying to  
10 pinpoint.

11 A. -- time period.

12 Q. What aspect of the 2003  
13 transaction specifically affected the -- or  
14 caused or contributed to a decline in sales  
15 between 2004 and 2008? What term of the  
16 transaction is what I'm looking for?

17 A. Well, I don't know that it's one  
18 specific thing. I think what you're looking at  
19 is a transaction that significantly impaired  
20 the liquidity of the company on a go-forward  
21 basis, and that impaired the company's ability  
22 to deal with the declining sales issue, a  
23 declining sales issue that had started before  
24 they did the transaction and that they should  
25 have known about.

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1 Q. Do you -- is it your position that  
2 any aspect of the 2003 transaction caused a  
3 decline in sales or caused the inability of  
4 consultants to continue selling product at the  
5 level that they had been selling it prior to  
6 2003?

7 A. Well, again, subject to having  
8 expert testimony and experts look at that  
9 issue, which we'd certainly reserve the right  
10 to do, based on what I know now, it appears  
11 that the lack of liquidity, and there's  
12 indications in the e-mails to this effect, that  
13 the company wasn't able to invest in programs  
14 that they -- that at least -- the financial  
15 projection people, the modeling people thought  
16 might improve the sales at later points in  
17 time, say in 2006, 2007 time frame, and that  
18 they were constrained from doing that because  
19 all the dollars were going elsewhere to deal  
20 with the consequences of the 2003 ESOP  
21 transaction.

22 Q. So other than the lack of dollars,  
23 in your mind, that the company could use to  
24 invest in new product that some financial  
25 people thought would improve the ability of the

60 (Pages 462 to 465)

<p style="text-align: right;">Page 466</p> <p>1 consultants to sell, can you identify any other 2 aspect of the 2003 transaction that caused 3 sales to decline? 4 A. I don't think that that accurately 5 states my answer. I think that it's not just 6 new products. There were IT issues. There 7 were various other issues in the company that 8 if you look at the e-mails in the total in that 9 time frame, that the company did not have 10 necessary liquidity to deal with because all 11 the moneys -- you know, those dollars had gone 12 out in the ESOP transaction and the aftermath 13 of that. That's what it appears to me from the 14 e-mails and the documents that we've seen. 15 Q. Is it generally your view that the 16 ESOP transaction -- that the lack of liquidity, 17 as you called it -- well, let's take a step 18 back. 19 When you call it lack of 20 liquidity, let's just nail down a couple of 21 benchmarks. You don't have any knowledge or 22 facts that the company was unable to make any 23 payment to any of its creditors through the 24 first quarter of 2008, do you? 25 A. Through when?</p>	<p style="text-align: right;">Page 468</p> <p>1 any creditor between the date the transaction 2 closed and the first quarter of 2008? 3 A. I can't think of anything sitting 4 here presently. 5 Q. Okay. 6 A. I'm sorry. 7 MS. ANDREW: Are you finished? 8 THE WITNESS: Yes. 9 MS. ANDREW: We're over time. 10 MR. SCHEIER: Well, we've always 11 given each other courtesy of going a little over 12 time so I just have a couple of follow-up 13 questions. 14 MS. ANDREW: If it's on the same 15 question basically. 16 MR. SCHEIER: It is. 17 MS. ANDREW: Okay. 18 BY MR. SCHEIER: 19 Q. And the same question being this 20 lack of cash. So the company is making all of 21 its payments to its creditors throughout that 22 period. Are you also aware that the company 23 did introduce at least four new web-based 24 products during that same period, that period 25 being the date of the closing of the</p>
<p style="text-align: right;">Page 467</p> <p>1 Q. The first quarter of 2008. 2 A. I don't know about that. Again, I 3 think this is a topic that's probably better 4 said -- 5 Q. Sir, whether or not they paid -- 6 I'm asking you whether you have any facts that 7 the company failed to make a payment to any of 8 its creditors through the first quarter of 9 2008, and I will tell you it does not require 10 an expert's opinion. Either they did or they 11 didn't make a payment to any specific creditor. 12 A. Again, testing my memory, I can't 13 think of anything right now; but I'm not -- I'm 14 not -- 15 Q. You're suing a lot of people for 16 an awful lot of money, and this is our only 17 chance to talk to you; and so I'm asking you, 18 based on your best recollection, based on all 19 the preparation you've done over the last few 20 days with your lawyers, with whoever else 21 you've prepared with, looking at seven hundred 22 and fifty or so deposition exhibits and 23 reviewing deposition transcripts or portions 24 thereof, do you have any knowledge that The 25 Antioch Company failed to make any payment to</p>	<p style="text-align: right;">Page 469</p> <p>1 transaction and the first quarter of 2008? 2 A. I understood that there were 3 various things introduced, yeah. 4 Q. Did you review Miss Borstad's 5 transcript and her testimony that the field, in 6 her view, that she felt she was close to, is 7 very excited about those four products? 8 A. I don't recall that specific part 9 of her transcript; but, okay, if you say that 10 that's there, that's there. 11 Q. All right. Do you have any 12 expertise to render an opinion on whether or 13 not, in fact, the company invested an 14 appropriate or an inappropriate amount of money 15 between the closing of the transaction and the 16 first quarter of 2008 in new product 17 development? 18 A. I do not have any expertise in 19 that area. 20 Q. Have you engaged an expert to give 21 you such an opinion, without disclosing who 22 that might be? 23 A. No. 24 Q. You have not. 25 MR. SCHEIER: Okay. I have no</p>

<p style="text-align: right;">Page 470</p> <p>1 further questions.  2 THE WITNESS: Thank you.  3 THE VIDEOGRAPHER: We're off the  4 record.  5 (Thereupon, the deposition was  6 concluded at 4:21 p.m.)  7  8  9  10  11  12  13  14  15  16  17  18  19  20  21  22  23  24  25</p>	<p style="text-align: right;">Page 472</p> <p>1 STATE OF OHIO )  2 COUNTY OF MONTGOMERY ) SS: CERTIFICATE  3 I, Kathy S. Wysong, a Notary  4 Public within and for the State of Ohio, duly  5 commissioned and qualified,  6 DO HEREBY CERTIFY that the  7 above-named W. TIMOTHY MILLER, was by me first  8 duly sworn to testify the truth, the whole truth  9 and nothing but the truth.  10 Said testimony was reduced to  11 writing by me stenographically in the presence  12 of the witness and thereafter reduced to  13 typewriting.  14 I FURTHER CERTIFY that I am not a  15 relative or Attorney of either party, in any  16 manner interested in the event of this action,  17 nor am I, or the court reporting firm with which  18 I am affiliated, under a contract as defined in  19 Civil Rule 28(D).  20  21  22  23  24  25</p>
<p style="text-align: right;">Page 471</p> <p>1 I, W. TIMOTHY MILLER, do hereby certify  2 that the foregoing is a true and accurate  3 transcription of my testimony.  4  5  6 -----  7  8 Dated -----  9  10  11  12  13  14  15  16  17  18  19  20  21  22  23  24  25</p>	<p style="text-align: right;">Page 473</p> <p>1 IN WITNESS WHEREOF, I have hereunto set  2 my hand and seal of office at Dayton, Ohio, on  3 this ____ day of _____, 2012.  4  5  6 -----  7 KATHY S. WYSONG, RPR  8 NOTARY PUBLIC, STATE OF OHIO  9 My commission expires 12-1-2013  10  11  12  13  14  15  16  17  18  19  20  21  22  23  24  25</p>

1 STATE OF OHIO )

2 COUNTY OF MONTGOMERY ) SS: CERTIFICATE

3 I, Kathy S. Wysong, a Notary  
4 Public within and for the State of Ohio, duly  
5 commissioned and qualified,

6 DO HEREBY CERTIFY that the  
7 above-named W. TIMOTHY MILLER, was by me first  
8 duly sworn to testify the truth, the whole truth  
9 and nothing but the truth.

10 Said testimony was reduced to  
11 writing by me stenographically in the presence  
12 of the witness and thereafter reduced to  
13 typewriting.

14 I FURTHER CERTIFY that I am not a  
15 relative or Attorney of either party, in any  
16 manner interested in the event of this action,  
17 nor am I, or the court reporting firm with which  
18 I am affiliated, under a contract as defined in  
19 Civil Rule 28(D).

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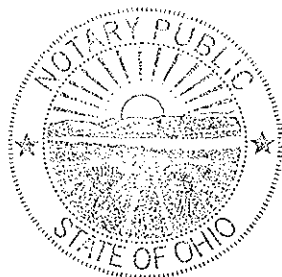
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1                   IN WITNESS WHEREOF, I have hereunto set  
2 my hand and seal of office at Dayton, Ohio, on  
3 this 31st day of December, 2012.

4                   *Kathy S. Wysong*



KATHY S. WYSONG, RPR  
NOTARY PUBLIC, STATE OF OHIO  
My commission expires 12-1-2013

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